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IN THE

Supreme Court of the United States

SETH MARINEAU, KATHLEEN MORRIS-KORTZ, DOUGLAS SHOIK, and RODNEY GRAHAM,

Petitioners,

v.

ZACHARY GUILES, by his father and next friend, Timothy Guiles; and by his mother and next friend Cynthia Lucas,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the First Amendment allows public schools to prohibit students from displaying symbols of drugs and alcohol on clothing worn during the school day.

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INTRODUCTION

This case challenges the ability of school administrators to control the learning environment of their schools with regards not only to drugs and alcohol but also to any other activities, including dress, which could be considered expression and thereby arguably protected by the First Amendment.

The Defendants enforced a school policy which had been developed as part of a drug and alcohol education program to require a student, the plaintiff Zachary Guiles, to cover up just the graphic images of drugs, alcohol and drug paraphernalia on the t-shirt he was wearing to school. The t-shirt had many other graphic images as well as text criticizing George W. Bush for his drug and alcohol abuse.

The District Court found that the defendant's were not motivated by the anti-Bush message. Instead it found that the defendants "acted pursuant to a neutral policy prohibiting dress bearing images of drugs and alcohol." The District Court reasoned that under *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 92 L. Ed. 2d 549, 106 S. Ct. 3159 (1986), a school could censor the manner rather than the message if the manner is offensive or inappropriate for the middle school environment. It then found that part of the manner of communication, the images of drugs and alcohol, were inappropriate and could be censored as outlined above.

The Second Circuit, in this case, stated that a school is only permitted to censor student speech that is " "lewd", "vulgar", "indecent" or "plainly offensive"". The court's understanding of "plainly offensive" is limited to "something less than but related to that concept, that is to say, speech

containing sexual innuendo and profanity." It then held that the censorship violated Mr. Guiles rights under the First Amendment reversing the District Court.

This radical limitation of the ability of school administrators to control the school learning environment comes at a time when our schools are most challenged in educating our youth. School officials are now faced with the dilemma of understanding, what parts of the school learning environment they may legally control.

This Court now has an opportunity to provide guidance with regard to the regulation of the school learning environment. This is particularly important now that the Second Circuit is a direct conflict with the opinion of the Sixth Circuit in *Boroff v. Van Wert City Bd. of Educ.*, 220 F.3d 465 (6th Cir. 2000)

OPINIONS BELOW

The orders and judgment of the United Stated District Court for the District of Vermont (per Sessions, C.J.) are reprinted at Appendix B and are published at 349 F. Supp. 2d 871. The Second Circuit's decision (per Cardamone, J. joined by Pooler, J and Sotomayor, J.) reversing the District Court is reprinted at Appendix A and is published at 461 F.3d 320.

JURISDICTION

The Second Circuit rendered its decision on August 30, 2006. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AND SCHOOL DISTRICT RULES INVOLVED

1. The First Amendment to the United States Constitution provides in part:

> Congress shall make no law. . . . abridging the freedom of speech.

2. Williamstown Middle High School policy on dress code provides"

> We recognize that personal expression through dress is an important aspect of our culture for developing a sense of individualism, and this should be allowed to develop within our system. However, we must remember we are part of an academic community and our guidelines must reflect a sense of responsibility and integrity.
>
> Therefore, we need to separate personal expression from offensiveness by the following guidelines:
>
> > Any aspect of a person's appearance, which otherwise constitutes a real hazard to the health and safety of self and others or is otherwise distracting, is unacceptable as an expression of personal taste. Example [*Clothing displaying alcohol, drugs*, violence, obscenity and racism is outside our responsibility guidelines as a school and *is prohibited.*] (Emphasis added.)

STATEMENT OF THE CASE

A. Factual Background

The plaintiff, Zachary Guiles, a seventh grader, wore an anti-George W. Bush T-shirt to school in May of 2004. The shirt included several graphic images, as well as text criticizing the president for his drug and alcohol abuse, his service in the National Guard to avoid the draft, and an allegation that his business dealings had violated the law. Some of the graphics were of drugs, alcohol and drug paraphernalia. Photographic images of the T-shirt are included in Appendix E.

Mr. Guiles had worn the T-shirt to school off and on for several weeks prior to the day it was brought to the attention of School Administrator Seth Marineau. Mr. Marineau, after consulting with the Superintendent of Schools, believed that the T-shirt violated the school rule against the display of images of drug and alcohol on clothing.

Mr. Marineau reviewed the T-shirt with Mr. Guiles. He noted the offending graphic images which he believed violated the school policy. In reviewing the images he also noted the word "cocaine" and initially indicated that it too needed to be covered. Mr. Marineau on further review decided that the use of the word "cocaine" did not violate the school policy but failed to communicate that fact to Mr. Guiles.

He offered Mr. Guiles the option out of turning the T-shirt inside out, changing the shirt, or covering just the images of drug and alcohol. Mr. Guiles decline any of these options and was suspended from school for the remainder of

the day. (There was conflict over whether or not Mr. Guiles was required to cover over the word "Cocaine". Mr. Marineau testified that he had said to cover it initially and then realized the word did not violate the policy. However, the District Court found that Mr. Marineau failed to communicate that to Mr. Guiles. It is acknowledged that the word did not violate the policy and did not need to be covered up. Mr. Guiles testified that even with that allowance he would not have covered the remaining images.)

On the following day, May 13, 2004, Mr. Guiles returned to school wearing the same t-shirt. He was again offered the three options and again refused. He was sent home from school. A disciplinary record was created.

On May 14, 2004, Mr. Guiles returned to school with the same t-shirt. This time he had covered the images of drugs, alcohol and drug paraphernalia as instructed. He used duct tape on which he had written the word "censored". Mr. Marineau reviewed the T-shirt and Mr. Guiles was permitted to remain in school. Photographic images of the T-shirt as covered are included in Appendix E.

Mr. Marineau was enforcing a school policy against wearing clothing that bear images of drugs or alcohol. This policy is similar to that in many schools in Vermont and the nation. The policy is a part of an overall anti-drug policy and philosophy. The concern is that exposure to images of drugs and alcohol in the school setting could breed familiarity and acceptance among their middle school students. Banning these images, which appear even on brand name clothing, (including hats of popular NASCAR drivers) and sporting goods (a Budweiser Basketball), is not perceived as a one shot silver bullet answer to the problem of drug and alcohol

abuse by our youth, but is part of a larger program of education embodied in school programs and policies. It is an attempt to control the environment of the school.

The Administration of the Williamstown Middle High School is familiar with the community of students with which it works. They work closely with the police on drug issues of the community. They receive reports from students, and especially those seeking help from the school's Student Assistance Program. They have reviewed the joint survey of student risk behavior conducted by the Vermont Department of Health and Department of Education. It is entitled "The 2003 Vermont Risk Behavior Survey, Summary Results for Participating Schools in the Orange North Supervisory Union" (at A-36 to A-54 of the Joint Appendix in the Second Circuit record.) The Williamstown Middle High School is part of the Orange North Supervisory Union and is the only middle school and high school.

The survey shows that 69% of students in Williamstown Middle High School believe that it is easy to get cigarettes, 66% of students report that it is easy to get alcohol, and 54% of students report that it is easy to get marijuana. The survey also shows that 17% of 10th graders had used cocaine. 14% percent of all high school students had used marijuana. And 66% of all students had had a drink of alcohol, other than a few sips.

The District Court found that the school administration had "substantial grounds for prioritizing drug prevention policies". *Guiles v. Marineau*, 349 F. Supp. 2d 871 (D. Vt. 2004), *rev'd*, 461 F.3d 320 (2d Cir. 2006).

The Williamstown Middle High School Board is also required by federal law and state regulation to have drug and alcohol policies. Safe And Drug-Free Schools And Communities Act, 20 U.S.C. § 7101

No further action was taken before suit was filed.

B. Procedural History

Mr. Guiles filed suit in the United States District Court for the District of Vermont and a three day bench trial ensued.

On December 20, 2004, Chief Judge William Sessions found that the school administrators stayed within the bounds of the First Amendment when they required Mr. Guiles to cover those symbols on this T-shirt that depict drugs and alcohol.

Chief Judge Sessions reviewed the three cases from this court that provide the framework for approaching cases involving the First Amendment rights of school students. *Tinker v. Des Moines Ind. Sch. Dist.*, 393 U.S. 503, 506, 21 L. Ed. 2d 731, 89 S. Ct. 733 (1969); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 92 L. Ed. 2d 549, 106 S. Ct. 3159 (1986); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 98 L. Ed. 2d 592, 108 S. Ct. 562 (1988).

The District Court noted that expressive rights of students must be balanced against the educators need to maintain discipline and create a positive learning environment citing *Tinker*, 393 U.S. at 507.

In a process which is common to student free speech cases, Chief Judge Sessions first addressed the decision in

Tinker. *Tinker*, the District Court noted, involved pure political speech which was entirely divorced from actual or potential disruptive conduct. The District Court stated that "*Tinker* holds that when ever school officials make a content-based prohibition of speech they must have "evidence that it is necessary to avoid material and substantial interference with schoolwork or discipline." *Id.* at 511.

The District Court then reviewed the decision in *Fraser*. The District Court found that "Under *Fraser*, administrators may ensure that the *form or manner* of speech is appropriate for the school setting even though they may not regulate the *political content* of the speech unless they satisfy *Tinker*'s disruption test."

Finally the District Court reviewed this Court's decision in *Hazelwood*. It found that schools were permitted to exercise editorial control over the style and content of student speech in school sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns. The District Court concluded that *Hazelwood* did not apply in the context of this case.

The District Court reasoned that this Court's ruling in *Fraser* permitted administrators to ensure that the "form or manner of speech is appropriate for the school setting even though they may not regulate the political content of the speech unless they satisfy *Tinker*'s disruption test." The District Court chose to emphasize the view that *Fraser* "speaks to the form and manner of student speech, not substance. It addresses the mode of expression, not its content or viewpoint" citing *East High Gay/Straight Alliance v. Bd. of Educ. Of Salt Lake City Sch. Dist.*, 81 F. Supp. 2d 1166, 1193 (D. Utah 1999).

Chief Judge Sessions noted that the "evidence strongly suggests that the defendants were not motivated by the T-shirts anti-Bush message". He cited the fact that Mr. Guiles was permitted to wear the T-shirt for some time until the symbols of drugs and alcohol were noticed, and that the school has permitted Mr. Guiles to continue to wear the shirt as long as he placed tape over these "small images."

Chief Judge Sessions did find that the initial statement that Mr. Guiles needed to cover the word "cocaine" did violate Mr. Guiles First Amendment rights and ordered the school to expunge his customary record. The District Court found that the school district could prohibit Mr. Guiles from displaying the images of drugs and alcohol on his anti-Bush T-shirt and could continue to enforce its policy against the wearing of clothing with images of drugs and alcohol.

On appeal the Second Circuit reversed. *Guiles v. Marineau, et al.*, 461 F.3d 320 (2d Cir. 2006).

The Second Circuit also engaged in an analysis of the three Supreme Court cases-*Tinker-Fraser-Hazelwood.* The Court first found that *Hazelwood* does not apply. The reasoning was that the deferential standard of *Hazelwood* applies "only when the student speech is "school sponsored" or when a reasonable observer would believe it to be so sponsored."

The Second Circuit then specifically rejected the District Court's analysis of *Fraser* noting that "*Fraser* permits schools to censor student speech that is 'vulgar,' 'indecent,' or 'plainly offensive.' *Fraser*, 478 U.S. at 683-85; *Hazelwood*, 484 U.S. at 271 n.4 (discussing *Fraser*)."

The Second Circuit stated that the question then is "whether the images of a martini glass, a man drinking from a bottle, and lines of cocaine constitute lewd, vulgar, indecent or plainly offensive speech." It then found that the images do not constitute lewd, vulgar, indecent or plainly offensive speech. It then undertook an analysis of language used in Fraser to justify the position that the language must be "indecent" in some fashion in order to be censored. *Guiles*, 461 F.3d at 327.

The Second Circuit then vacated the District Court's order insofar as it denied Mr. Guiles declaratory judgment action seeking to enjoin the defendants from enforcing the dress code with regards to the T-shirt.

REASONS FOR GRANTING THE PETITION

The petition should be granted for two reasons. *First*, the Second Circuit's decision, as a practical matter, renders long-standing commonplace school policies against drug messages unenforceable. Indeed, it calls into question efforts by school districts to regulate student expression in a wide variety of contexts. While many courts have struggled with the framework created by the *Tinker-Fraser-Hazelwood* decisions, they have generally found a way to regulate student expression which is in conflict with the educational mission of the schools. The Second Circuit's decision has eroded the administrators understanding of what is permissible.

This case is similar to the problem presented by *Frederick v. Juneau School Board et al.*, 439 F.3d 1114 (9th Cir. 2006), *petition for cert. pending*.

In *Frederick*, the District Court held that school administrators could discipline a student for displaying a sign reading "BONG HITS FOR JESUS". *Frederick v. Morse*, 2003 U.S. Dist. LEXIS, 27270 (D. Alaska 2003), *vacated*, 439 F.3d 1114 (9th Cir. 2006) The District Court cited Fraser in the same manner as the District Court in Vermont for the proposition that speech that "might undermine the school's basic education mission and, therefore, as instruments of the state, they may determine that certain speech does not teach students the boundaries of appropriate social behavior." *Supra*, at 20. The District Court upheld the disciplining of the students for displaying the sign.

On appeal the Ninth Circuit vacated that decision. *Frederick, supra.* It found that *Fraser* was limited to sexual speech and that the display of the sign did not disrupt a school assembly. The Court said "what schools are entitled to do, as *Fraser* makes clear, is suppress speech that disrupts the good order necessary to conduct their educational function." *supra* at 1120.

Second, there is now a conflict between the Circuits. The decision of the Second Circuit in *Guiles*, and the Ninth Circuit in *Frederick*, are in direct conflict with the Sixth Circuit's decision in *Boroff.*

Boroff reviewed the disciplining of a student for wearing a T-shirt supporting the Marilyn Manson band. The school district sought to exclude the shirt as promoting values that were so patently contrary to the school's educational mission that he needed to be censored. The Sixth Circuit began its review of the District Court decision with a review of the *Tinker-Fraser-Hazelwood* trilogy of cases. Focusing on *Fraser* as the applicable standard, the Ninth Circuit quoted

Fraser as stating that "[a] school need not tolerate student speech that is inconsistent with its "basic educational mission . . . even though the government could not censor similar speech outside the school."" *Boroff*, 220 F.3d at 470. Thus, the Sixth Circuit is in agreement with the District Court decisions in *Guiles* and in *Frederick*, decisions which were overturned by the Second Circuit and Ninth Circuit.

I. The Court Should Clarify Whether The First Amendment Precludes School Administrators From Regulating The Messages About Drugs And Alcohol In The Schools.

Since this Court last address student speech in *Kuhlmeier*, lower courts considering the First Amendment rights of public school students, have analyzed disputes under the so-called *Tinker-Fraser-Hazelwood* trilogy of cases.

The analysis under Tinker is usually straightforward. That is, was the speech disruptive of school work and discipline.

Where the school is promoting the forum for speech, e.g. school newspaper cases, the analysis falls under *Hazelwood.* However a large number of the cases do not fall neatly into the "school sponsored speech" category.

This is particularly troublesome where the speech impacts on the mission of the school. In particular the duty imposed on schools by the Safe And Drug-Free Schools And Communities Act, 20 U.S.C. § 7101 *et seq.* and state regulations.

Most courts which have consider the issue of drug related speech have focused on *Fraser* to find the censorship of messages that conflict with the schools mission constitutional. At least this was the approach prior to the Second Circuit's opinion in Guiles and the Ninth Circuit's opinion in *Frederick*.

Several courts, relying on *Fraser*, recognized that prohibitions on pro-drug messages are constitutional because such expression is offensive and inconsistent with the mission of schools to combat substance abuse. *See, e.g., Boroff*, 220 F.3d at 471 (upholding ban on Marilyn Manson t-shirts because singer promoted drug use), *cert. denied*, 532 U.S. 920 (2001); *Nixon v. N. Local Sch. Dist.*, 383 F. Supp. 2d 965, 971 (S.D. Ohio 2005) ("Examples [of offensive speech under *Fraser*] are speech containing vulgar language, graphic sexual innuendos, or speech that promotes suicide, drugs, alcohol, or murder."); *Barber v. Dearborn Pub. Sch.*, 286 F. Supp. 2d 847, 859 (E.D. Mich. 2003) ("[W]hen student speech is . . . lewd, obscene, or vulgar (including related to alcohol or drugs), school officials may curtail that speech."); *Gano v. Sch. Dist. No. 411*, 674 F. Supp. 796, 798-99 (D. Idaho 1987) (upholding prohibition of t-shirt depicting drunken administrators) Even the dissent in *Boroff* found agreement with the majority that a school could prohibit pro-drug messages. *Boroff*, 220 F.3d at 474 (Gilman, J., dissenting) ("If the majority is suggesting that the School could have concluded that Marilyn Manson's apparent endorsement of, say, illegal drug use, makes his picture an unacceptable image for students to wear in high school, I would agree.").

The Second Circuit, by ruling in this case that the *Fraser* language that the images must be "plainly offensive" (which

it defines to mean that they must "offend" in the same way as obscenities do), guts the decision and requires schools to permit behaviors that seriously erode the mission of the schools. *Guiles*, 461 F.3d at 328.

Note that administrators in this case and those that have used *Fraser* to justify regulation of form and manner of speech have not prohibited the discussion of ideas and opinions, they have simply sought to have the form and manner of speech be consistent with the school's mission.

It should be noted that the policy of the Williamstown Middle High School Board is common in Vermont and the nation. In its petition for certiorari, the Petitioners in *Frederick v. Juneau School Board*, specifically identified similar policies sponsored by state agencies in Arizona, California, Illinois, New York, Texas, and Wisconsin. A copy of that portion of their petition is set out in Appendix D.

This is an issue vital to schools in every Circuit. This Court should grant the petition for certiorari.

II. The Court Should Resolve The Conflict In The Meaning Of Its Decision In *Fraser* Between The Second Circuit And Ninth Circuit On The One Hand And The Sixth Circuit On The Other.

There is a genuine conflict between the Circuits as to the meaning of this Court's holding in *Fraser*.

The Second Circuit with the Ninth Circuit have taken a very restrictive view of the ability of school administrators to regulate "form and manner" of expression within the school.

In *Guiles*, as noted above, the Second Circuit stated:

> We distill the following from Tinker, Fraser, and Hazelwood:
>
> (1) schools have wide discretion to prohibit speech that is less than obscene — to wit, vulgar, lewd, indecent or plainly offensive speech, *Fraser, 478 U.S. at 683-85*; **[**15]** *Hazelwood, 484 U.S. at 272 n. 4*;
>
> (2) if the speech at issue is "school-sponsored," educators may censor student speech so long as the censorship is "reasonably related to legitimate pedagogical concerns," *Hazelwood, 484 U.S. at 273*; and
>
> (3) for all other speech, meaning speech that is neither vulgar, lewd, indecent or plainly offensive under Fraser, nor school-sponsored under Hazelwood, the rule of Tinker applies. Schools may not regulate such student speech unless it would materially and substantially disrupt classwork and discipline in the school. See *Tinker, 393 U.S. at 513.*

Guiles, 461 F.3d at 325.

The problem is that they then define "plainly offensive" so narrowly as make its inclusion redundant. They then find that the Guiles T-shirt fails to meet the standard and cannot be censored.

Similarly, the Ninth Circuit in *Boroff* rejected the idea that the school could censor speech which belittled and undercut the "critical school mission" of preventing use of illegal drugs. Fraser would only apply to sexual content. The Ninth Circuit then went on to suggest that speech about marijuana in Alaska is almost always political because of the frequency of referendum on it. Accordingly they refused to apply *Fraser* and found that Tinker applies. *Boroff* , 220 F.3d at 119.

The Sixth Circuit in *Boroff* focused on the language in Fraser that "the school board has the authority to determine 'what manner of speech in the classroom or in school is inappropriate.' *Fraser*, 478 U.S. at 683". *Boroff*, 220 F.3d at 471. It then approved the censorship of a T-shirt because it promoted values contrary to the school's educational mission.

The Circuits have applied two different standards to T-shirts that each conflict with the school's educational mission and have arrived at two very different results. This Court should resolve that conflict.

III. This Case Was Wrongly Decided.

This is a case of a student being required to cover up several small images of drugs, alcohol and drug paraphernalia in compliance with a common school policy prohibiting the display of those images on clothing.

The requirement to cover the symbols left intact the political message criticizing George Bush. The United States District for the District of Vermont correctly applied *Fraser* and found the enforcement of the policy proper. That decision should be reinstated.

CONCLUSION

For these reason, a writ of certiorari should issue to review the judgment and opinion of the second Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED AND FILED AUGUST 30, 2006

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Docket Nos. 05-0327-cv(L), 05-0517-cv(XAP)

October 28, 2005, Argued

August 30, 2006, Decided

ZACHARY GUILES, by his mother and father and next friends, Cynthia Lucas and Timothy Guiles,

Plaintiff-Appellants
Cross Appellees

vs.

SETH MARINO, KATHLEEN MORRIS-KORTZ, DOUGLAS SHOIK and RODNEY GRAHAM,

Defendants-Appellees
Cross Appellants

JUDGES: Before: CARDAMONE, POOLER, and SOTOMAYOR, Circuit Judges.

OPINION BY: CARDAMONE

Appendix A

OPINION: CARDAMONE, Circuit Judge:

This case requires us to sail into the unsettled waters of free speech rights in public schools, waters rife with rocky shoals and uncertain currents. Plaintiff Zachary Guiles, a 13-year-old student at Williamstown Middle High School (WMHS, Williamstown High School, or school) in Williamstown, Vermont, claims his right under the *First Amendment* to wear a T-shirt depicting President George W. Bush in an uncharitable light has been violated. The T-shirt, through an amalgam of images and text, criticizes the President as a chicken-hawk president and accuses him of being a former alcohol and cocaine abuser. To make its point, the shirt displays images of drugs and alcohol.

Upon the complaint of another student and her mother, school officials made Guiles put duct tape over the alcohol- and drug-related pictures on the ground that those illustrations violate a school policy prohibiting any display of such images. Plaintiff, through his mother and father, brought the instant action to enjoin the school's application of the policy to his shirt, asserting that the policy violates his freedom to engage in political speech. After a three-day bench trial, the United States District Court for the District of Vermont (Sessions, C.J.) held the school's censorship a permissible abridgement of Guiles's *First Amendment* rights. From this holding the plaintiff appeals. The District Court also ordered that the disciplinary action defendants took against plaintiff be expunged from his school record. From this holding defendants appeal. *Guiles ex rel. Lucas v. Marineau,* 349 F. Supp. 2d 871 (D. Vt. 2004). For the reasons

set forth below, we affirm in part, vacate in part, and remand this case to the District Court.

BACKGROUND

A. The Parties

In May 2004 plaintiff Guiles was a seventh-grade student at Williamstown Middle High School. Defendant Seth Marineau was the student support specialist at the school during the 2003-2004 academic year. His job included enforcing dress code policy. Defendant Kathleen Morris-Kortz was the principal of the high school, and defendant Douglas Shoik was the superintendent of the Orange North Supervisory Union, which includes WMHS (collectively, defendants). In his action Guiles has sued the defendants in their official capacities.

B. The T-shirt

In March 2004 plaintiff began wearing the offending T-shirt to school. He had purchased it at an anti-war rally he attended. The front of the shirt, at the top, has large print that reads "George W. Bush," below it is the text, "Chicken-Hawk-In-Chief." Directly below these words is a large picture of the President's face, wearing a helmet, superimposed on the body of a chicken. Surrounding the President are images of oil rigs and dollar symbols. To one side of the President, three lines of cocaine and a razor blade appear. In the "chicken wing" of the President nearest the cocaine, there is a straw. In the other "wing" the President is holding a martini glass with an olive in it. Directly below all these depictions is

printed, "1st Chicken Hawk Wing," and below that is text reading "World Domination Tour."

The back of the T-shirt has similar pictures and language, including the lines of cocaine and the martini glass. The representations on the back of the shirt are surrounded by smaller print accusing the President of being a "Crook," "Cocaine Addict," "AWOL, Draft Dodger," and "Lying Drunk Driver." The sleeves of the shirt each depict a military patch, one with a man drinking from a bottle, and the other with a chicken flanked by a bottle and three lines of cocaine with a razor. Without question Guiles's T-shirt uses harsh rhetoric and imagery to express disagreement with the President's policies and to impugn his character.

C. School Action Relating to the T-shirt

Guiles wore the T-shirt on average once a week for two months. Although the shirt evoked discussion from students, it did not cause any disruptions or fights inside or outside the school. But, the T-shirt raised the ire of one fellow student whose politics evidently were opposed to Guiles's. This student complained to teachers who told her that the shirt was political speech and therefore protected.

On May 12, 2004 Guiles was to go on a school field trip. He wore the T-shirt that day. A parent who was to chaperone the trip — indeed the parent of the student who had previously complained to teachers regarding the shirt — noticed the shirt and voiced her objection to defendant Marineau.

Appendix A

Marineau, after consulting with Shoik, determined that the T-shirt, specifically the images of drugs and alcohol, violated the following provision of the WMHS dress code:

> Any aspect of a person's appearance, which constitutes a real hazard to the health and safety of self and others or is otherwise distracting, is unacceptable as an expression of personal taste. Example [Clothing displaying alcohol, drugs, violence, obscenity, and racism is outside our responsibility and integrity guideline as a school community and is prohibited].

WMHS Student/Parent Handbook 2003-2004 at 13 (brackets in original).

Marineau gave Guiles three choices: (1) turn the shirt inside-out; (2) tape over the images of the drugs and alcohol and the word "cocaine"; or (3) change shirts. Marineau was unsure whether the word cocaine violated the policy. He did not, however, relay this doubt to the student, leaving the student to think that it too must be taped over. Guiles's father came in to speak with Marineau, who reiterated that the shirt contravened dress code policy. Guiles and his father then went to speak with Shoik who reaffirmed what Marineau had said. Guiles returned home with his father for the remainder of that day.

On May 13, 2004 plaintiff returned to school wearing the T-shirt. Marineau again instructed him to tape over the offending images with duct tape, turn the shirt inside out, or change shirts. Guiles declined, and Marineau filled out a

discipline referral form and sent plaintiff home. The discipline referral form remains in Guiles's record. On May 14, 2004 Guiles again wore the T-shirt to school, this time, however, with the images of drugs and alcohol and the word "cocaine" covered with duct tape. On the duct tape plaintiff had scrawled the word "Censored."

DISTRICT COURT PROCEEDINGS

Plaintiff then brought suit in federal District Court seeking to enjoin defendants from enforcing the dress code policy with regard to his T-shirt, and the District Court conducted a three-day bench trial. Defendants submitted the deposition testimony of Carol L. Rose, the prevention and safety coordinator for the Safe and Healthy School Team at the Vermont Department of Education. Rose opined that the Williamstown High School's policy of prohibiting all images of drugs and alcohol (even such images used on anti-drug T-shirts and posters) was appropriate because it furthers the school's environmental approach — which calls for limiting student exposure to all such images. However, when asked whether "clothing that depicts anti-alcohol, drug or cigarette messages is just as harmful to students as clothing that advertises it," she responded that she did not know.

Plaintiff submitted a letter of the Vermont Department of Education stating that it did not take a position with respect to the merits of the case and that "[t]estimony provided by deposition of Carol Rose . . . was not intended to draw any conclusions with respect to the outcome of the case or any substantive legal issue therein [and] [t]o the extent it did, it did not reflect an official position" of the Department. Guiles

also presented the testimony of Charles Phillips, a former principal of a neighboring school. Phillips testified that at his school the approach was to ban images that advocated drug and alcohol use. He also testified that he was unaware of any evidence that anti-drug and anti-alcohol messages encouraged students to use such substances. Because Guiles's T-shirt conveyed an anti-drug message, he would not have censored it at his school.

Finding the images plainly offensive or inappropriate under *Bethel School District No. 403 v. Fraser,* 478 U.S. 675, 106 S. Ct. 3159, 92 L. Ed. 2d 549 (1986), the District Court held the school's censorship of the images was proper and declined to issue an injunction. The trial court also held the school violated Guiles's free speech rights by censoring the word cocaine, and therefore it ordered the discipline referral form expunged from Guiles's academic record. Guiles and defendants both appeal.

DISCUSSION

Standard of Review

Normally we review the District Court's findings of fact for clear error and its conclusions of law de novo. See Fed. R. Civ. P. 52(a); *Ramos v. Town of Vernon,* 353 F.3d 171, 174 (2d Cir. 2003). But because this appeal concerns allegations of abridgement of free speech rights, we do not defer to the District Court's findings of fact. Instead, in *First Amendment* cases we make an independent and searching inquiry of the entire record, since we are obliged to conduct a "fresh examination of crucial facts . . . so as to assure

ourselves that [the lower court's] judgment does not constitute a forbidden intrusion on the field of free expression." *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group*, 515 U.S. 557, 567-68, 115 S. Ct. 2338, 132 L. Ed. 2d 487 (1995); see also *Bery v. City of New York*, 97 F.3d 689, 693 (2d Cir. 1996) ("[W]e are required to make an independent examination of the record as a whole without deference to the factual findings of the trial court.").

I Free Speech Law in Schools

We wrestle on this appeal with the question of how far a student's constitutional right freely to express himself on school grounds extends. As the Supreme Court aptly put it, "[o]ur problem lies in the area where students in the exercise of *First Amendment* rights collide with the rules of the school authorities." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 507, 89 S. Ct. 733, 21 L. Ed. 2d 731 (1969). We begin with several premises. First, we are mindful that the "vigilant protection of constitutional freedoms is nowhere more vital than in the community of [our] schools." *Healy v. James*, 408 U.S. 169, 180, 92 S. Ct. 2338, 33 L. Ed. 2d 266 (1972). Thus neither party disputes that "students have *First Amendment* rights to political speech in public schools." *Brandon v. Bd. of Educ.*, 635 F.2d 971, 980 (2d Cir. 1980). But while students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," *Tinker*, 393 U.S. at 506, neither are their rights to free speech "automatically coextensive with the rights of adults," *Fraser*, 478 U.S. at 682. Indeed even for adults it is familiar law that "the right of free speech is not absolute at all times and under all circumstances." *Chaplinsky v. New Hampshire*, 315 U.S.

568, 571-72, 62 S. Ct. 766, 86 L. Ed. 1031 (1942) (noting that certain limited categories of speech may be prevented without raising a constitutional problem: "These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words — those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.").

With these basic precepts in mind, we discuss Tinker, Fraser, and Hazelwood, a trilogy of cases in which the Supreme Court enunciated standards for assessing whether a school's censorship of student speech is constitutionally permissible.

Tinker involved high school students who, to protest the Vietnam war, sought to wear black armbands to school. 393 U.S. at 504. In light of this proposed collective act of expression, the school prohibited the wearing of black armbands and punished students who ignored the ban. *Id.* Holding that this constituted an unconstitutional abridgement of the students' free speech rights, the Supreme Court ruled that with regard to "personal expression that happens to occur on the school premises," *Hazelwood Sch. Dist. v. Kuhlmeier,* 484 U.S. 260, 271, 108 S. Ct. 562, 98 L. Ed. 2d 592 (1988) (discussing Tinker), a student may "express his opinions, even on controversial subjects . . . if he does so without materially and substantially interfer[ing] with the requirements of appropriate discipline in the operation of the school and without colliding with the rights of others," *Tinker,* 393 U.S. at 513 (alteration in original). The rule of Tinker has come to mean that a school may not regulate student expression unless the regulation may be "justified

by a showing that the student['s] [speech] would materially and substantially disrupt the work and discipline of the school." *Id.*; see also *Hazelwood,* 484 U.S. 260, 280-81, 108 S. Ct. 562, 98 L. Ed. 2d 592 (Brennan, J., dissenting) ("[O]fficial censorship of student expression . . . is unconstitutional unless the speech materially disrupts classwork or involves substantial disorder or invasion of the rights of others.").

Nearly two decades later the Supreme Court revisited student speech in Fraser. School officials in Fraser disciplined a student for giving a speech peppered with sexual innuendo at a school assembly. *Fraser,* 478 U.S. at 677-79. The Court held the school's actions permissible because "it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse" among its students. *Id.* at 683. Schools may regulate student speech insofar as it is "vulgar," "lewd," "indecent," or "plainly offensive." *Id.* at 683-85; *Hazelwood,* 484 U.S. at 271 n. 4 ("The decision in Fraser rested on the 'vulgar,' 'lewd,' and 'plainly offensive' character of" the student's speech). The Court declined to apply Tinker's more exacting material and substantial disturbance test because the student's speech was "unrelated to any political viewpoint." *Fraser,* 478 U.S. at 685.

The Supreme Court's examination of student speech continued in Hazelwood, where school officials censored certain articles in the school newspaper written by students regarding teen-age pregnancy and a student's experience with divorce. *Hazelwood,* 484 U.S. at 263-65. The Supreme Court upheld the school's action relying on the distinction between

school-sponsored speech and student speech that happens to occur on school grounds. See *id.* at 270-73. In the case of the former, school officials may exercise editorial control over student speech "so long as their actions are reasonably related to legitimate pedagogical concerns." *Id.* at 273; see also *Peck v. Baldwinsville Cent. Sch. Dist.*, 426 F.3d 617, 627-29 (2d Cir. 2005) (discussing difference between Tinker — speech that happens to occur on school property — and Hazelwood — school sponsored speech).

We distill the following from Tinker, Fraser, and Hazelwood:

> (1) schools have wide discretion to prohibit speech that is less than obscene — to wit, vulgar, lewd, indecent or plainly offensive speech, *Fraser,* 478 U.S. at 683-85; *Hazelwood,* 484 U.S. at 272 n. 4;
>
> (2) if the speech at issue is "school-sponsored," educators may censor student speech so long as the censorship is "reasonably related to legitimate pedagogical concerns," *Hazelwood,* 484 U.S. at 273; and
>
> (3) for all other speech, meaning speech that is neither vulgar, lewd, indecent or plainly offensive under Fraser, nor school-sponsored under Hazelwood, the rule of Tinker applies. Schools may not regulate such student speech unless it would materially and substantially disrupt class work and discipline in the school. See *Tinker,* 393 U.S. at 513.

Our articulation of the Tinker - Fraser - Hazelwood trilogy is in accord with how other circuits commonly understand these cases. See, e.g., *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 214 (3d Cir. 2001) (Alito, J.) ("To summarize: Under Fraser, a school may categorically prohibit lewd, vulgar or profane language. Under Hazelwood, a school may regulate school-sponsored speech . . . . Speech falling outside of these categories is subject to Tinker's general rule . . . ."); *Chandler v. McMinnville Sch. Dist.*, 978 F.2d 524, 529 (9th Cir. 1992) ("We conclude . . . that the standard for reviewing the suppression of vulgar, lewd, obscene, and plainly offensive speech is governed by Fraser, school-sponsored speech by Hazelwood, and all other speech by Tinker.").

We pause here to acknowledge some lack of clarity in the Supreme Court's student-speech cases. Tinker involved political viewpoint-based discrimination and established a "material and substantial interference" test that permits schools to restrict student speech only where, as noted, "necessary to avoid material and substantial interference with schoolwork or discipline." 393 U.S. at 511. It is not entirely clear whether Tinker's rule applies to all student speech that is not sponsored by schools, subject to the rule of Fraser, or whether it applies only to political speech or to political viewpoint-based discrimination. Nor is Tinker entirely clear as to what constitutes "substantial disorder" or "substantial disruption" of or "material interference" with school activities. *Id.* at 513-14. The opinion alludes to "threats [and] acts of violence on school premises," *id.* at 508, but does not otherwise explain what might qualify as "materially and substantially disrupt[ing] the work and discipline of the school." *Id.* at 513.

Language in the Supreme Court's subsequent ruling in Hazelwood sheds some light on these questions by suggesting that the Court considers the rule of Tinker to be generally applicable to student-speech cases. *Hazelwood,* 484 U.S. at 270-73 (distinguishing between the Tinker standard "for determining when a school may punish student expression" and "the standard for determining when a school may refuse to lend its name and resources to the dissemination of student expression"). But see *Fraser,* 478 U.S. at 680 (noting "[t]he marked distinction between the political 'message' of the armbands in Tinker and the sexual content of [the] speech in this case" and that the Court had upheld "the students' right to engage in a nondisruptive, passive expression of a political viewpoint in Tinker" (emphasis added)); *id.* at 685 (noting that the penalties imposed for the sexually explicit speech were "unrelated to any political viewpoint" and thus did not implicate the rule of Tinker); *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico,* 457 U.S. 853, 866, 102 S. Ct. 2799, 73 L. Ed. 2d 435 (1982) (plurality opinion) (stating that Tinker "held that students' rights to freedom of expression of their political views could not be abridged by reliance upon an 'undifferentiated fear or apprehension of disturbance' arising from such expression" (emphasis added)). Proceeding according to the understanding that Tinker applies to all non-school-sponsored student speech that is not lewd or otherwise vulgar, we note that if the "material and substantial interference" test is meant to describe vocal protests and disputes of similar character and magnitude, schools must tolerate a great deal of student speech that is not lewd or vulgar. Put differently, Tinker established a protective standard for student speech under

which it cannot be suppressed based on its content, but only because it is substantially disruptive.

II Applying the Supreme Court Standards

We turn next to which standard applies to this appeal. That the parties vigorously contest this point is not surprising. Where this case falls on the Tinker — Fraser — Hazelwood spectrum primarily determines whether the defendants' censorship of Guiles's T-shirt survives *First Amendment* scrutiny. For the reasons set out below, we hold that neither *Hazelwood* nor *Fraser* govern, and therefore, the general rule of *Tinker* applies.

A. Hazelwood Does Not Apply

We agree with the District Court that Hazelwood is inapplicable. The deferential standard of Hazelwood, which permits schools to regulate student speech so long as the regulation reasonably relates to "legitimate pedagogical concerns," *Hazelwood*, 484 U.S. at 273, comes into play only when the student speech is "school-sponsored" or when a reasonable observer would believe it to be so sponsored, see *id.* at 273-74; *Peck*, 426 F.3d at 628-29; *Saxe*, 240 F.3d at 213-14 (noting that "Hazelwood's permissive 'legitimate pedagogical concern' test governs only when a student's school-sponsored speech could reasonably be viewed as speech of the school itself" (emphasis added)). No one disputes that the school did not sponsor Guiles's T-shirt or that the T-shirt could not reasonably be viewed as bearing the school's imprimatur. While we do not doubt that an anti-drug and alcohol policy may be of "legitimate pedagogical

concern" to schools, absent school sponsorship, defendants may not look to Hazelwood for support.

B. Fraser Does Not Apply

We disagree with the district judge that Fraser governs this case. The District Court applied Fraser, reasoning that it must ask whether "the images of drugs and alcohol are offensive or inappropriate," and concluding that, if so, "then, under Fraser, they may be censored." *Guiles,* 349 F. Supp. 2d at 881 (emphasis added). The trial court then accepted the "judgment of the defendants that such images are an inappropriate form of expression for their middle school" and accordingly, upheld the school's censorship of Guiles's T-shirt. *Id.* We believe the District Court misjudged the scope of Fraser and, consequently, applied it in error.

Fraser's reach is not as great as the trial court presumed. Fraser permits schools to censor student speech that is "lewd," "vulgar," "indecent," or "plainly offensive." *Fraser,* 478 U.S. at 683-85; *Hazelwood,* 484 U.S. at 271 n. 4 (discussing Fraser). We thus ask whether the images of a martini glass, a bottle and glass, a man drinking from a bottle, and lines of cocaine constitute lewd, vulgar, indecent, or plainly offensive speech. We think it clear that these depictions on their own are not lewd, vulgar, or indecent. Lewdness, vulgarity, and indecency normally connote sexual innuendo or profanity. See Merriam-Webster's Third New Int'l Dictionary 1147, 1301, 2566 (1st ed. 1981) (defining (a) "lewd" as "inciting to sensual desire or imagination," (b) "vulgar" as "lewd, obscene, or profane in expression," and (c) "indecent" as "being or tending to be obscene").

We are left then with the question of whether the pictures are plainly offensive. Indeed, the District Court held Fraser applicable on the basis of its "plainly offensive" language, which it interpreted broadly. *Guiles*, 349 F. Supp. 2d at 881. What then constitutes plainly offensive speech under Fraser? And, can we say that depictions of drugs and alcohol such as those on Guiles's T-shirt are plainly offensive? These are questions of first impression in this Circuit. While what is plainly offensive is not susceptible to precise definition, we hold that the images depicted on Guiles's T-shirt are not plainly offensive as a matter of law.

Dictionaries commonly define the word offensive as that which causes displeasure or resentment or is repugnant to accepted decency. See Merriam-Webster's Third Int'l Dictionary 1156; Black's Law Dictionary 1110 (7th ed. 1999). We doubt the Fraser Court's use of the term sweeps as broadly as this dictionary definition, and nothing in Fraser suggests that it does. But if it does, then the rule of Tinker would have no real effect because it could have been said that the school administrators in Tinker found wearing anti-war armbands offensive and repugnant to their sense of patriotism and decency. Yet the Supreme Court held the school could not censor the students' speech in that case.

What is plainly offensive for purposes of Fraser must therefore be somewhat narrower than the dictionary definition. Courts that address Fraser appear to treat "plainly offensive" synonymously with and as part and parcel of speech that is lewd, vulgar, and indecent — meaning speech that is something less than obscene but related to that concept, that is to say, speech containing sexual innuendo and

profanity. See *Frederick v. Morse,* 439 F.3d 1114, 1118-19 (9th Cir. 2006) (discussing Fraser's focus on sexually charged nature of student speech); see also *Saxe,* 240 F.3d at 213 (noting that "Fraser permits a school to prohibit words that 'offend for the same reasons that obscenity offends'"). In fact, the Supreme Court deemed Fraser's speech could be freely censored because it was imbued with sexual references, bordering on the obscene. See *Fraser,* 478 U.S. at 683 ("The pervasive sexual innuendo in Fraser's speech was plainly offensive to both teachers and students." (emphasis added)).

What is more, the cases cited by Fraser all concern vulgarity, obscenity, and profanity. See *Fraser,* 478 U.S. at 684-85, where the Supreme Court cites *Ginsberg v. New York,* 390 U.S. 629, 639-41, 88 S. Ct. 1274, 20 L. Ed. 2d 195 (1968) (upholding ban on sale of sexually oriented material to minors); *Pico,* 457 U.S. at 871-72 (acknowledging that school may remove "pervasively vulgar" books from library); and *FCC v. Pacifica Found.,* 438 U.S. 726, 745-48, 98 S. Ct. 3026, 57 L. Ed. 2d 1073 (1978) (upholding FCC's ability to censor "obscene, indecent, or profane" speech). It is further instructive on this point that the Ninth Circuit's recent opinion in Frederick refused to uphold a school's disciplinary action against a student who displayed a clearly pro-drug banner, which read "Bong Hits 4 Jesus." *Frederick,* 439 F.3d at 1123. In distinguishing Fraser and holding it did not apply, the Ninth Circuit stated: "The phrase 'Bong Hits 4 Jesus' may be funny, stupid, or insulting, depending on one's point of view, but it is not 'plainly offensive' in the way sexual innuendo is." *Id.* at 1119.

Appendix A

Judge Newman's oft-quoted concurrence in a case that pre-dates Fraser also suggests that the District Court's reading of Fraser is incorrect. Judge Newman noted that "[t]he *First Amendment* does not prevent a school's reasonable efforts toward the maintenance of campus standards of civility and decency" and memorably stated that "the *First Amendment* gives a high school student the classroom right to wear Tinker's armband, but not Cohen's jacket." *Thomas v. Bd. of Educ., Granville Cent. Sch. Dist.*, 607 F.2d 1043, 1057 (2d Cir. 1979) (Newman, J., concurring) (referring to *Cohen v. California*, 403 U.S. 15, 91 S. Ct. 1780, 29 L. Ed. 2d 284 (1971), in which the Supreme Court upheld an adult's right to wear a jacket bearing the statement "[F. . . expletive deleted] the Draft"). The import of his analysis was that "a school can act to keep indecent language from circulating on high school grounds." *Id.* Fraser itself quoted Judge Newman and indicated that its rule applies to the "manner of speech," i.e., the offensiveness of its form, but not the speech's content. 478 U.S. at 682-83, 685; see also *Hazelwood*, 484 U.S. at 286 n. 2 (Brennan, J., dissenting) (stating that Fraser is limited to "the appropriateness of the manner in which the message is conveyed, not of the message's content") (emphasis in original); *Newsom ex rel. Newsom v. Albemarle County Sch. Bd.*, 354 F.3d 249, 256 (4th Cir. 2003) ("When speech in school falls within the lewd, vulgar, and plainly offensive rubric, it can be said that Fraser limits the form and manner of speech, but does not address the content of the message."); *Boroff v. Van Wert City Bd. of Educ.*, 220 F.3d 465, 473 (6th Cir. 2000) (Gilman, J., dissenting) (noting that the terms "vulgar" and "offensive" in Fraser "refer to words and phrases that are themselves

coarse and crude, regardless of whether one disagrees with the overall message that the speaker is trying to convey").

Moreover, the Fraser Court, in noting the "interest in protecting minors from exposure to vulgar and offensive spoken language," discussed at some length its earlier opinion in *Pacifica,* 438 U.S. 726, 98 S. Ct. 3026, 57 L. Ed. 2d 1073. *Fraser,* 478 U.S. at 684-85. Pacifica involved comedian George Carlin's "Filthy Words" monologue, which the Fraser Court characterized as "vulgarity." *Id.* at 685. It noted that the words comprising the monologue, which dealt with sexuality and excretion, "offend for the same reasons that obscenity offends." *Id.*; *Saxe,* 240 F.3d at 213 (noting that "Fraser permits a school to prohibit words that 'offend for the same reasons that obscenity offends'"). For these reasons and others we discuss below, although we need not conclusively determine what is "plainly offensive" under Fraser to resolve the instant case, we decline to adopt the position of the Sixth Circuit in Boroff that a school has broad authority under Fraser to prohibit speech that is "inconsistent with its basic educational mission." 220 F.3d at 470; *Frederick,* 439 F.3d at 1122 (declining to follow Boroff's implication that schools have "wide-ranging discretion to determine the appropriateness or inappropriateness of certain messages at school" under Fraser).

Here, the images of a martini glass, alcohol, and lines of cocaine, like the banner in *Frederick*, may cause school administrators displeasure and could be construed as insulting or in poor taste. We cannot say, however, that these images, by themselves, are as plainly offensive as the sexually charged speech considered in *Fraser* nor are they as offensive as

profanity used to make a political point. See *Thomas,* 607 F.2d at 1057 (Newman, J., concurring in result). We do not think in light of this discussion that the images on plaintiff's T-shirt are plainly offensive, especially when considering that they are part of an anti-drug political message.

III Defendants' Argument Rejected

Defendants principally declare that all images of illegal drugs and alcohol — even images expressing an anti-drug view, such as those on Guiles's T-shirt — are plainly offensive because they undermine the school's anti-drug message. We do not find this argument persuasive.

To begin, sister circuits have rejected similar arguments. In *Newsom,* 354 F.3d 249, the Fourth Circuit addressed a school dress code that prohibited all images of weapons on clothing. *Id.* at 254. The student in Newsom was told not to wear a National Rifle Association T-shirt that depicted "'men shooting guns.'" *Id.* at 253. As in the case before us, the school in Newsom relied on the argument that the image conflicted with the school's "message" that "Guns and Schools Don't Mix." *Id.* at 252-53. In striking the dress code as overly broad, Newsom applied Tinker instead of Fraser and held essentially that while pictures of weapons that promote violence may arguably be regulated, *id.* at 257, it cannot be said that all such depictions are per se offensive, see *id.* at 259-60 (ruling that ban on all images of weapons overly broad); accord *Frederick,* 439 F.3d at 1121. Similarly, in *Castorina ex rel. Rewt v. Madison County School Board,* 246 F.3d 536 (6th Cir. 2001), the Sixth Circuit was confronted with a school's order that reprimanded a student for wearing

clothing bearing confederate flags. *Id.* at 538. Confederate flags have been associated with racist ideology, and could undermine the school's mission to promote tolerance. But the Sixth Circuit applied Tinker rather than Fraser and remanded the case for further fact-finding regarding disruption. *Id.* at 543-44.

The flaw in defendants' position is that it conflates the rule of Hazelwood with Fraser, and in doing so, eviscerates Tinker. Defendants censored the images because they believed such images were contrary to the school's basic educational aim of having an anti-drug school environment. We observe in passing that the witness offered by defendants to opine on their environmental methodology did not point to any specific evidence showing that anti-drug and alcohol images are harmful or lead to the use (or increased abuse) of such substances by high school students.

Moreover, the phrase "plainly offensive" as used in Fraser cannot be so broad as to be triggered whenever a school decides a student's expression conflicts with its "educational mission" or claims a legitimate pedagogical concern. Were that the rule then Fraser would effectively swallow Hazelwood's holding that school officials may censor student speech if (1) the censorship reasonably relates to a legitimate pedagogical concern, and (2) the speech is school-sponsored. *Hazelwood,* 484 U.S. at 273-74. Indeed, if schools were allowed to censor on such a wide-ranging basis, then Tinker would no longer have any effect. As the Ninth Circuit aptly stated

> All sorts of missions are undermined by legitimate and protected speech — a school's anti-gun mission would be undermined by a student passing around copies of John R. Lott's book, More Guns, Less Crime; a school's anti-alcohol mission would be undermined by a student e-mailing links to a medical study showing less heart disease among moderate drinkers than teetotalers
>
> . . . .

Frederick, 439 F.3d at 1120. We therefore decline to adopt defendants' sweeping reading of Fraser.

While the exact contours of what is plainly offensive are not so clear to us as the star Arcturus is on a cloudless night, they are evident enough for us to hold that the images of drugs and alcohol on Guiles's T-shirt are not offensive, let alone plainly so, under Fraser. We believe this is especially so given that these images are presented as part of an anti-drug T-shirt, and, moreover, a T-shirt with a political message. Indeed the Fraser court distinguished its holding from Tinker in part on the absence of any political message in Fraser's speech. See *Fraser*, 478 U.S. at 685 (refusing to apply Tinker because Fraser's speech did not involve political viewpoint).

IV Tinker Applies

Having determined that neither Hazelwood nor Fraser apply, we turn to Tinker. Applying *Tinker* to the facts of this case, we conclude that defendants' censorship of the images on Guiles's T-shirt violated his free speech rights. The parties

agree that Guiles's T-shirt did not cause any disruption or confrontation in the school. Nor do defendants contend they had a reasonable belief that it would. Guiles wore the T-shirt on average once a week for two months without any untoward incidents occurring. Only when a fellow student's mother — who had different political views from plaintiff — protested did defendants direct Guiles to cover the drug and alcohol illustrations. Because Guiles's T-shirt did not cause any disruption, defendants' censorship was unwarranted.

We find no merit in defendants' "no harm, no foul contention," namely, that though they directed the images covered, the text and other images remained, and hence, the political message of the T-shirt was left intact. The pictures are an important part of the political message Guiles wished to convey, accentuating the anti-drug (and anti-Bush) message. By covering them defendants diluted Guiles's message, blunting its force and impact. Such censorship may be justified under Tinker only when the substantial disruption test is satisfied.

We add that our holding on this appeal is limited. Guiles brings only an as-applied challenge to the dress code. He seeks declaratory relief enjoining defendants from enforcing the dress code as it applies to his particular T-shirt. We thus make no holding with respect to whether images of illegal drugs and alcohol on a T-shirt that promotes drug and alcohol use could be censored under the Supreme Court's student-speech cases. While the Court has indicated, in dicta, that "[a] school must ... retain the authority to refuse to sponsor speech that might reasonably be perceived to advocate drug

or alcohol use," *Hazelwood*, 484 U.S. at 272 (emphasis added), it has never addressed this issue. At least one of our sister circuits, however, has held that a school could not punish students for waiving a pro-drug banner near campus at a school-authorized event without reaching the question of whether the school could prohibit a student from wearing a pro-drug T-shirt on campus. *Frederick*, 439 F.3d at 1123 & n. 45. We address only the images on Guiles's T-shirt and do not prejudge any question to be presented in a subsequent case.

Finally, defendants have cross-appealed that part of the District Court's holding that the school should expunge Guiles's disciplinary record. Because we find that Guiles was entitled to the injunction permitting him to wear his T-shirt, we must affirm the ruling that Guiles's suspension should be expunged from his school record.

CONCLUSION

Accordingly, for the foregoing reasons, we vacate the District Court's order insofar as it denied Guiles's declaratory judgment action seeking to enjoin defendants from enforcing the dress code with regard to his T-shirt. We affirm the District Court's holding that the disciplinary action should be expunged from Guiles's record and remand this matter to the District Court for further proceedings consistent with this opinion.

APPENDIX B — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF VERMONT DATED AND FILED DECEMBER 20, 2004

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF VERMONT

Docket No. 2:04-cv-132

December 20, 2004, Decided

ZACHARY GUILES, by his mother and father and next friends, Cynthia Lucas and Timothy Guiles

Plaintiffs

vs.

SETH MARINO, KATHLEEN MORRIS-KORTZ, DOUGLAS SHOIK and RODNEY GRAHAM

Defendants

JUDGES: William K. Sessions III, Chief Judge, U.S. District Court

OPINION BY: William K. Sessions III

OPINION:

Appendix B

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. Introduction

This case requires the Court to balance the important values of a public school student's right to free speech and the authority of school officials to control the learning environment. The controversy here arose when a student, Zachary Guiles "Zach"), at Williamstown Middle High School "WMHS") wore a T-shirt critical of President George W. Bush. School administrators determined that the T-shirt was unacceptable school dress in so far as it contained images depicting drugs and alcohol. Zach was told that he could wear the shirt to school only if he covered the offending portions with tape.

Zach filed this action claiming that the censorship of the T-shirt was a violation of his *First Amendment* rights. He asked the Court to issue an injunction barring the defendants from further disciplining him for wearing the T-shirt and directing the defendants to expunge his disciplinary record connected with his wearing of the T-shirt.[1] A three-day bench trial followed.

While mindful that students retain significant *First Amendment* freedoms in an educational setting, for the reasons outlined below, the Court finds that the defendants stayed within the bounds set by the *First Amendment* when

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1. Zach's complaint also requested an injunction declaring WMHS's Appearance and Dress policy unconstitutional and void. At trial, Zach withdrew this request.

they required Zach to cover those symbols on his T-shirt that depict drugs and alcohol.

II. Facts

A. The Parties

Zachary Guiles, is a minor and brings this suit by his parents and next friends, Cynthia Lucas and Timothy Guiles. In May 2004, he was a seventh grade student at WMHS, his local public school. Zach, who during his testimony showed himself to be very articulate and mature for his age, is a good student who participates in extracurricular activities. Zach also plays trombone with the Vermont Youth Orchestra.[2] In the current school year, Zach is being home-schooled. Zach is still present at WMHS, however, as he attends music classes and participates in the school band.

All of the defendants are being sued in their official capacity. Defendant Seth Marineau was the Student Support Specialist at WMHS during the 2003-2004 academic year. Enforcing school policy (including the dress code) and disciplining students is an important part of his job. In the coming academic year, Marineau will be an Assistant

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2. It seems that plaintiffs in cases challenging school censorship tend to be especially bright and creative students. See, e.g., *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675, 692, 92 L. Ed. 2d 549, 106 S. Ct. 3159 (1986) (Stevens, J. dissenting) ("The respondent was an outstanding young man with a fine academic record."); *Pyle v. S. Hadley Sch. Comm.*, 861 F. Supp. 157, 160 (D. Mass. 1994) (plaintiffs, sons of a constitutional law professor, were highly successful in academic and extracurricular activities).

Principal at WMHS. Defendant Kathleen Morris-Kortz is the Principal of WMHS and has supervisory authority over Marineau.

Defendant Douglas Shoik is the Superintendent of the Orange North Supervisory Union, which includes WMHS. Defendant Rodney Graham is the chairperson of the School Board for the Town of Williamstown, Vermont.

B. Factual Findings

At some point in March 2004, Zach began wearing a T-shirt to school that is critical of President George W. Bush. Zach obtained this shirt from a representative of the Vermont Green Party at an anti-war rally. The shirt is highly critical of President Bush and contains many different symbols and blocks of text.[3] Pl.'s Ex. 1.

The shirt's largest text (found on both the front and the back) refers to President Bush as the "Chicken-Hawk-in-Chief" who is engaged in a "World Domination Tour."[4] In smaller text, the shirt accuses the President of being a "crook," "AWOL draft dodger," "lying drunk driver" and an abuser of marijuana and cocaine. The shirt is covered with a variety of images including oil wells, dollar signs and

3. As Zach's teacher Kathleen Raymond testified, it is a very "busy" shirt.

4. Zach testified that, in this context, "Chicken-Hawk" is intended to refer to someone who shows an enthusiasm for war but a personal reluctance to fight.

chickens. Included among these images are some small drawings depicting drugs and alcohol.

The front and the back of the shirt include a large image of President Bush wearing a helmet with "AWOL" written on it. The President's small and very crudely drawn body appears to be the body of a chicken. In one 'wing' the President is holding a martini glass. In the other 'wing' the President is holding a straw. Next to the straw are three lines of cocaine and a razor blade.

Other small images of drugs and alcohol are found on the T-shirt's sleeves. The left sleeve includes an image of a chicken with a champagne bottle on one side and three lines of cocaine on the other. The right sleeve has a coat of arms labeled "Chicken Hawk Guard" and includes a drawing of a soldier drinking from a bottle. There is no question that, as a whole, the T-shirt communicates a very strong political message of disapproval (if not disdain and outright loathing) of the President's character and policies.

Zach wore the shirt approximately once per week for two months. Although some students expressed disapproval of Zach's shirt, this did not lead to any major disruption or fights. Some students complained to teachers about the shirt but the teachers responded that the shirt was permitted. These initial determinations were based on very brief inspections and the teachers did not notice the small drawings depicting drugs. Eventually, one of Zach's teachers, Kathleen Raymond, did notice these drawings and mentioned the shirt to WMHS's principal, Kathleen Morris-Kortz. The school principal did not find time to inspect Zach's shirt. Thus, it

wasn't until May 12, 2004 that school authorities acted to censor the shirt.

On May 12, Guiles attempted to wear the shirt on a school field trip. A parent, who had come to school to assist with the field trip, complained to Seth Marineau, the student support specialist at Williamstown Middle High School. Marineau inspected the T-shirt and decided that it probably violated the school's dress code. Marineau called Superintendent Douglas Shoik to discuss the issue and they determined that the shirt did violate the code. The school dress policy reads in relevant part:

We recognize that personal expression through dress is an important aspect of our culture for developing a sense of individualism, and this should be allowed to develop within our system. However, we must remember we are part of an academic community and our guidelines must reflect a sense of responsibility and integrity.

Therefore, we need to separate personal expression from offensiveness by the following guidelines:

> Any aspect of a person's appearance, which otherwise constitutes a real hazard to the health and safety of self and others or is otherwise distracting, is unacceptable'as an expression of personal taste. Example [Clothing displaying alcohol, drugs, violence, obscenity and racism is outside our responsibility guidelines as a school and is prohibited.]

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Williamstown Middle High Sch. Student/Parent Handbook 2003-2004 at 13, Pl.'s Ex. 2. Specifically, Marineau and Shoik concluded that the T-shirt violated the prohibition on clothing displaying alcohol or drugs.

Marineau provided Guiles with three choices: (1) turn the shirt inside out; (2) tape over the images of drugs and alcohol plus the word "cocaine"; or (3) change shirts. After presenting Zach with these options, Marineau began to have doubts about whether the dress code required Zach to cover the word "cocaine" as well as the images of drugs. Marineau did not communicate this doubt to Zach, however, so Zach was given the impression that he would have to cover the word "cocaine" to be in compliance with school policy.

Zach asked to call his father, Tim Guiles. Zach and his father met with Marineau and then visited Superintendent Shoik. Shoik reaffirmed Marineau's decision. At that point, Zach went home for the day.

On May 13, 2004, Zach returned to school wearing the same T-shirt. Marineau again instructed him to either change shirts, turn the shirt inside out or tape over the offending portions. Zach declined these choices and Marineau filled out a Discipline Referral Form and sent Zach home for the rest of the day. Pl.'s Ex. 3. There is some dispute between the parties about whether this disciplinary action constituted a 'suspension.' Regardless of the exact label attached to the action, however, it is undisputed that Zach was removed from school for the day and this is now part of Zach's disciplinary record at WMHS.

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On May 14, Zach wore the T-shirt once again. This time, however, he covered the symbols depicting drugs and the word "cocaine" with duct tape. He wrote "censored" on each piece of duct tape. At some point during the day, Marineau saw Zach and inspected the shirt. Marineau told Zach that the shirt was now acceptable un she der the school dress code.

The defendants have required other students to change their clothing to conform to the school's dress code. Marineau and other teachers have required students to remove "Budweiser" hats and T-shirts advertising alcohol. Zach's shirt is the first article of censored clothing that included political content, however. On May 27, 2004, Zach filed this lawsuit challenging the school's actions.

At trial, the defendants submitted the deposition testimony of Carol L. Rose. Rose Dep. (Defs.' Ex. DD). Rose is the prevention and safety coordinator for the Safe and Healthy School Team at the Vermont Department of Education. Rose testified that, although Zach's shirt communicated an anti-Bush message, it could also communicate a mixed message about drugs. In particular, Rose was concerned that students could conclude that using drugs and alcohol are acceptable because one can use them and still become president of the United States. *Id.* at 33:13-24, 62:18-63:7. Rose also testified that it is important for educators to be able to control students' exposure to messages about drugs within the learning environment. See *id.* at 9:21-10:17. Rose called this an "environmental approach" to drug and alcohol education. *Id.*

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The defendants also testified about the importance of controlling messages about drugs and alcohol at school. They explained that the prohibition of displays of drugs and alcohol is part of WMHS's overall anti-drug policy and philosophy. They expressed concern that unsupervised exposure to images of drugs could breed familiarity and acceptance among their middle school students. The defendants explained that it can be difficult to determine the exact meaning of their students' clothing.[5] Thus, they prefer a bright-line rule against any display of drugs and alcohol. This prevents students from wearing clothing that may suggest disapproval of drugs but is actually intended to present a pro-drug message. Moreover, the bright-line rule enables educators to supervise and control their students' exposure to drug images within the school environment.

Zach offered the testimony of the former principal of Montpelier High School, Charles Phillips. Phillips explained that he took a different approach at his school. He claimed that he did not apply a bright-line rule prohibiting any clothing that depicted drugs or alcohol. Rather, he prohibited any clothing that promoted the use of drugs and alcohol. Thus, he would not have censored Zach's T-shirt because he did not believe that it promoted drugs or alcohol.

The defendants explained that WMHS's dress code does not prevent students from wearing clothing containing text that addresses the issue of drugs. For example, the school

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5. Defendants offered the example of the apparently innocuous number "420" which can refer to marijuana and a tradition of smoking marijuana on April 20.

does not prohibit the wearing of anti-drug D.A.R.E. T-shirts (even though administrators suspect that some students wear these shirts in a spirit of ironic defiance).

Although few students have been caught using drugs or alcohol on school premises, administrators at WMHS consider drug and alcohol use to be a serious concern. This he concern is based on a number of factors. School administrators regularly liaise with local police about drug problems in the community. Administrators also receive reports from students, particularly from students seeking help from the school's Student Assistance Program. Finally, administrators consider the worrying results of a survey conducted as a combined initiative by Vermont's Department of Health and Department of Education. See The 2003 Vermont Risk Behavior Survey, Summary Results for Participating Schs. in the Orange N. Supervisory Union at 14-31, Defs. Ex. M. These factors provide authorities at WMHS with substantial grounds for prioritizing drug prevention policies. Given the potentially devastating consequences of drug addiction, educators at WMHS believe that they have a responsibility to do what they can to help their students stay away from drugs.

III. Discussion

A. The Defendants' Motion to Dismiss

At the close of trial, the defendants moved to dismiss for failure to join a necessary party under Rule 19. Under Rule 19, a case can be dismissed if a judgment would not be effective because of the absence of a non-party. Fed. R. Civ.

P. 19(b). The defendants claim that they do not have the authority to alter WMHS's dress policy. They claim that only the School Board for the Town of Williamstown can change the policy. According to the defendants, this means that the Court would not be able to provide the relief sought by Zach.

Zach has sued the chairperson of the School Board for the Town of Williamstown, Rodney Graham, in his official capacity. This means he has sued the head of the body that could change the dress code at WMHS. This may give the Court authority to order that the policy be changed. The Court does not have to reach this issue, however. This is because Zach has not requested this kind of relief. The only question for the Court is whether it can enjoin these defendants from *enforcing* the dress cade.

At the start of trial, Zach made it clear that he only sought an injunction preventing the defendants from censoring his anti-Bush T-shirt. Zach withdrew his request for declaratory relief holding WMHS's dress policy unconstitutional. Similarly, Zach has never asked the Court for an order directing the defendants to enact a new policy. Zach only seeks an injunction against enforcement. The defendants enforce the policy at Zach's school. Thus, the case can proceed against these defendants.

The defendants argue that a court cannot enjoin enforcement without joining a defendant who is capable of changing the underlying policy. Clearly, this cannot be correct. If it were, a plaintiff could not ask for an injunction prohibiting enforcement of a state law without joining the state legislature as a party.

Case law supports this conclusion. "It is well-settled that a state official may properly be made a party to a suit seeking to enjoin the enforcement of an allegedly unconstitutional act if that official plays some role in the enforcement of the act." *Schulz v. Williams,* 44 F.3d 48, 61 n.13 (2d Cir. 1994) (quotation marks and citation omitted). In fact, *Ex parte Young,* 209 U.S. 123, 52 L. Ed. 714, 28 S. Ct. 441 (1908) illustrates this fundamental principle. In Young, the Supreme Court upheld an injunction 'prohibiting a state attorney general from enforcing a state law. See *Young,* 209 U.S. at 157-62. This injunction was allowed even though the attorney general did not have the authority to change the law. As the Young Court noted, "in such case no affirmative action of any nature is directed, and the officer is simply prohibited from doing an act which he had no legal right to do." *Id.* at 159.

Similarly, if Zach can show that the defendants have violated the Constitution by censoring his T-shirt then the Court could enjoin the defendants from further acts of censorship. Thus, the defendants' motion to dismiss is denied.

B. Applicable Supreme Court Authority Concerning School Students' Right to Freedom of Expression

The Supreme Court has made it clear that the *First Amendment* protects the free speech rights of students within the school setting. Thus, "it can hardly be argued that either students or teachers shed their constitutional rights at the schoolhouse gate." *Tinker v. Des Moines Ind. Sch. Dist.,* 393 U.S. 503, 506, 21 L. Ed. 2d 731, 89 S. Ct. 733 (1969). For example, the *First Amendment* prevents schools from

compelling students to salute the flag. See *W. Va. State Bd. of Educ. v. Barnette,* 319 U.S. 624, 87 L. Ed. 1628, 63 S. Ct. 1178 (1943). Similarly, the *Establishment Clause of the First Amendment* prevents schools from requiring students to participate in prayer. See *Engel v. Vitale,* 370 U.S. 421, 8 L. Ed. 2d 601, 82 S. Ct. 1261 (1962).

Expressive rights deserve special attention within the school setting because educators serve as role models to their students. "That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes." *Barnette,* 319 U.S. at 637. While recognizing the importance of students' freedom of expression, the Supreme Court has noted that expressive rights must be balanced against educators' need to maintain discipline and create a positive learning environment. See, e.g., *Tinker,* 393 U.S. at 507 (noting the need to balance constitutional protection of speech with the authority of schools "to prescribe and control conduct").

Three major Supreme Court decisions provide the framework for approaching cases involving the *First Amendment* rights of school students. The first case is Tinker, in which a group of high school students wore black armbands as a silent protest against the Vietnam War. School administrators asked the students to remove the armbands while in school. *Tinker,* 393 U.S. at 504. Some students refused to comply with this request and were suspended. *Id.* The Court held that the wearing of an armband as a protest is an expressive act protected by the Free Speech Clause of

the *First Amendment*. See *id.* at 505-06. The Court emphasized that the wearing of armbands "was entirely divorced from actually or potentially disruptive conduct." *Id. at 505*. Thus, by censoring the protest, the school administrators were censoring "pure speech. "See *id.* at 505-06. The Court held that:

> In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint. Certainly where there is no finding and no showing that engaging in the forbidden conduct would materially and substantially interfere with the requirements of appropriate discipline in the operation of the school, the prohibition cannot be sustained.

Id. at 509 (quotation marks and citation omitted).

Tinker holds that whenever school officials make a content-based prohibition of speech they must have "evidence that it is necessary to avoid material and substantial interference with schoolwork or discipline." *Id.* at 511. Moreover, this evidence must be more than a mere "undifferentiated fear or apprehension of disturbance" if it is to overcome a student's right to freedom of expression. *Id.* at 508.

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In *Bethel Sch. Dist. No. 403 v. Fraser,* 478 U.S. 675, 92 L. Ed. 2d 549, 106 S. Ct. 3159 (1986), the Supreme Court further defined the boundaries of freedom of expression in schools. In Fraser, a high school had disciplined a student for giving a student government nominating speech filled with sexual innuendo. The Court emphasized the "marked distinction between the political "message" of the armbands in Tinker and the sexual content of the respondent's speech in this case." *Id.* at 680. The Court upheld the authority of the school to prohibit lewd or offensive speech even if this is not necessary to avoid material and substantial interference with schoolwork. See *id.* at 685-86; see also *Newsom v. Albemarle County Sch. Bd.*, 354 F.3d 249, 256 (4th Cir. 2003) (noting that "Fraser establishes an exception to Tinker's disruption requirement").

It is important to note that, in Fraser, "the penalties imposed ... were unrelated to any political viewpoint." *Fraser,* 478 U.S. at 685. This distinguishes Fraser from Tinker. Under *Fraser,* administrators may ensure that the *form or manner* of speech is appropriate for the school setting even though they may not regulate the *political* content of the speech unless they satisfy *Tinker's* disruption test. The Supreme Court explained this point with a reference to *Cohen v. California,* 403 U.S. 15, 29 L. Ed. 2d 284, 91 S. Ct. 1780 (1971). See *Fraser,* 478 U.S. at 682-83. In Cohen, the Court upheld the plaintiff's right to wear a jacket bearing the slogan "Fuck the Draft." *Cohen,* 403 U.S. at 23-26. In Fraser, the Court noted that it does not follow that "simply because the use of an offensive form of expression may not be prohibited to adults making what the speaker considers a political point, the same latitude must be permitted to children in a public

school." *Fraser*, 478 U.S. at 682. Thus, "the *First Amendment* gives a high school student the classroom right to wear Tinker's armband, but not Cohen's jacket." *Id.* (quotation marks and citation omitted).

Finally, the most recent Supreme Court decision addressing school speech is *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 98 L. Ed. 2d 592, 108 S. Ct. 562 (1988). In Hazelwood, the school had censored articles in the school newspaper. The Court held that "educators do not offend the *First Amendment* by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns." *Hazelwood*, 484 U.S. at 273.

Overall, these cases show that different standards apply in the school setting depending on the content and the context of the speech. In general, if educators censor student speech based on its political content then, under *Tinker*, they must have specific grounds for suspecting that the speech will disrupt the educational environment. If the speech occurs in a school-sponsored forum, however, then *Hazelwood* applies and the censorship only needs to be reasonably related to educational goals. Finally, under *Fraser*, educators may censor speech if the censorship is unrelated to the political message of the speech and is intended only to ensure that the speech is not lewd or otherwise offensive.

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C. Applying the Law to this Case

The question in this case is whether, consistent with this body of law, the defendants may prohibit Zach from displaying the images of drugs and alcohol on his clothing. It is clear that Zach's T-shirt is not school-sponsored speech. Thus, *Hazelwood* is not applicable. See *Castorina v. Madison County Sch. Bd.*, 246 in F.3d 536, 543 (6th Cir. 2001) (rejecting an argument that the school would be seen as endorsing a student's T-shirt displaying the confederate flag if it failed to ban the shirt). The more difficult issue is whether Tinker or Fraser is most relevant.

There is no question that Zach's T-shirt is political speech. This does not mean that Tinker's stringent disruption standard automatically applies, however. Fraser can be applied to lewd or inappropriate speech even if the speech has political content. Cohen's memorable jacket, for example, would fall within Fraser's ambit even though it expressed a political point about the draft. See *Fraser*, 478 U.S. at 682. Cohen's jacket could be censored because its political point is expressed through profanity. If administrators censor speech based on its message, however, then Tinker must be applied. The central question, therefore, is whether the defendants have acted to censor a viewpoint or whether they have acted to censor a form of speech that is inappropriate for the middle school environment.

The evidence strongly suggests that the defendants were not motivated by the T-shirt's anti-Bush message. In fact, school authorities allowed Zach to wear his T-shirt uncensored until they noticed the images of drugs. Moreover,

the school has allowed Zach to continue to wear the shirt as long as he places tape over these small images. In this form, the shirt's anti-Bush message is still patently clear. Thus, the Court is satisfied that the defendants have acted pursuant to a neutral policy prohibiting dress bearing images of drugs and alcohol.

At this point, it is useful to contrast the facts of this case with those in *Barber v. Dearborn Pub. Sch.*, 286 F. Supp. 2d 847 (E.D. Mich. 2003). In Barber, a student was prohibited from wearing a shirt that displayed an image of George Bush with the caption "International Terrorist." The school argued that this censorship was required because the shirt might offend Iraqi students at the school. See *Barber*, 286 F. Supp. 2d at 857. The court rejected this argument. The court noted the school had not met the burden set by Tinker because it had not shown that the shirt was likely to cause any disruption that would interfere with the school environment. See *id.*

Similarly, if the defendants in this case had censored the anti-Bush message of Zach's shirt then Tinker would be applied. The defendants would not prevail under the *Tinker* standard because they have not shown that the shirt will materially and substantially interfere with the educational environment. Defendants cannot make this showing because Zach wore his T-shirt on a number of occasions without causing disruption.

This case is distinguishable from *Barber*, however. Barber involved a clear example of political censorship. The defendants in Barber were concerned that the political message of the T-shirt would offend other students or cause

disruption. The District Court specifically noted that "Fraser is inapplicable as Barber's shirt did not refer to alcohol, drugs or sex." *Barber,* 286 F. Supp. 2d at 856. In contrast, this case concerns a dress policy prohibiting images of drugs and alcohol that has been applied in a politically neutral manner. Thus, *Fraser* is applicable.

It is also worth noting that the defendants' policy does not prohibit all clothing that addresses the topic of drugs. Thus, the policy is distinguishable from that held unconstitutionally overbroad in *Newsom v. Albemarle County Sch. Bd.,* 354 F.3d 249 (4th Cir. 2003) . In Newsom, the court reviewed a policy prohibiting students from wearing any "messages on clothing . . . that relate to drugs, alcohol, tobacco, weapons, violence, sex, vulgarity, or that reflect adversely upon persons because of their race or ethnic group." *Newsom,* 354 F.3d at 253. This policy silences any comment on the issue of drugs and would prohibit even anti-drug D.A.R.E. T-shirts. Thus, the policy in *Newsom* censored more than the manner of speech but removed entire topics from discussion. Thus, Fraser could not be applied to that policy. See, e.g., *East High Gay/Straight Alliance v. Bd. of Educ. Of Salt Lake City Sch. Dist.,* 81 F. Supp. 2d 1166, 1193 (D. Utah 1999) ("Fraser speaks to the form and manner of student speech, not its substance. It addresses the mode of expression, not its content or viewpoint.")

WMHS's dress code is different. WMHS does not silence all commentary on the topic of drugs. Rather, the defendants have interpreted their policy as only prohibiting images

displaying drugs and alcohol.[6] The dress code considered in *Newsom* would exclude any comment on President Bush's conviction for drunk driving or allegations regarding cocaine use. As such, that policy would censor much of the political content of Zach's shirt. In contrast, WMHS's policy leaves the text addressing these issues untouched. Thus, the policy at WMHS is entitled to review under the standard set by *Fraser* as it addresses only the manner of speech rather than its substance.

Having determined that the defendants have only censored the manner rather than the message of Zach's speech, the next question is whether the images of drugs and alcohol are offensive or inappropriate for the middle school environment. If the images of drugs are inappropriate then, under *Fraser,* they may be censored. The defendants and Carol Rose all testified that, based on their experience, student dress bearing images of drugs and alcohol is inappropriate for WMHS. They suggested that such clothing would interfere with their ability to present a consistent message regarding drugs and alcohol. They also testified that a bright-line rule enables them to prohibit clothing, such as Zach's, that might communicate a mixed message about drugs. In contrast, Charles Phillips testified that, at his high school, he only prohibited clothing that promoted the use of drugs and alcohol. Phillips did agree with the defendants' claim that consistency is very important for a school's overall anti-drug efforts. Moreover, Phillips' policy was designed

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6. As Zach withdrew his challenge to the constitutionality of the policy as a whole, the Court is considering the policy as applied in this case.

for a high school while WMHS is a middle school and includes students as young as eleven.

Zach's shirt includes images of alcohol and no fewer than three images of cocaine alongside drug paraphernalia. This Court accepts the judgment of the defendants that such images are an inappropriate form of expression for their middle school.

Although an alternate approach, such as that taken by Phillips at Montpelier High School, is possible, these decisions are best left to experienced educators in the field rather than federal judges. As long as a school is not censoring political content, school officials may prohibit dress bearing images of drugs and alcohol as inappropriate for the school environment. Thus, Zach is not entitled to an injunction allowing him to wear his T-shirt without tape covering the displays of drugs and alcohol.

D. The Disciplinary Action

Although Zach is not entitled to an injunction allowing him to wear the uncensored shirt, he is entitled to relief on his disciplinary record. There is a discrepancy between the defendants' position at trial and the initial demand they made of the plaintiff. At trial, the defendants only sought to retain the authority to prohibit the images of drugs and alcohol on Zach's shirt. In contrast, Marineau told Zach that he also had to cover textual references to cocaine. Moreover, Marineau did not tell Zach about his subsequent doubts about this request. Thus, Zach was under the impression that he

had to cover textual references to cocaine if he wanted to avoid being sent home from school.

Effectively, on both May 12 and May 13, Zach was given a choice between expressing his views about President Bush's, alleged drug use or going home. Thus, his viewpoint rather than just his manner of expression was censored and *Tinker* must be applied. As explained above, the defendants cannot satisfy *Tinker's* disruption test because the evidence showed that Zach wore his T-shirt on a number of occasions without causing any significant disruption.

This Court appreciates the difficulty of Marineau's task. His initial decision was made in the context of a busy school day rather than after lengthy rumination upon the finer points of constitutional law. In fact, Marineau and the other defendants showed respect for Zach's free speech rights and were sensitive to the fact that his T-shirt communicated a political message. Nevertheless, by asking Zach to cover all textual references to cocaine, Marineau impermissibly infringed Zach's right to freedom of speech as guaranteed by the *First Amendment*. Thus, Zach's disciplinary record should be expunged.

IV. Conclusion

For the reasons set forth above, the Court finds that the defendants may prohibit Zach from displaying the images of drugs and alcohol on his anti-Bush T-shirt. Thus, Zach is not entitled to injunctive relief barring defendants from further disciplining him for wearing the shirt. However, the Court does find that the defendants' initial act of censorship violated

Zach's right to freedom of speech as guaranteed by the First and *Fourteenth Amendments.* Therefore, the Court orders that the defendants expunge any disciplinary record Zachary Guiles acquired in connection with therewith.

CASE CLOSED

Dated at Burlington, Vermont this 20th day of December 2004.

William K. Sessions III
Chief Judge, U.S. District Court

APPENDIX C — WILLIAMSTOWN MIDDLE HIGH SCHOOL STUDENT/PARENT HANDBOOK 2003-2004 AT 13, PL.'S EX. 2

We recognize that personal expression through dress is an important aspect of our culture for developing a sense of individualism, and this should be allowed to develop within our system. However, we must remember we are part of an academic community and our guidelines must reflect a sense of responsibility and integrity.

Therefore, we need to separate personal expression from offensiveness by the following guidelines:

> Any aspect of a person's appearance, which otherwise constitutes a real hazard to the health and safety of self and others or is otherwise distracting, is unacceptable as an expression of personal taste. Example [Clothing displaying alcohol, drugs, violence, obscenity and racism is outside our responsibility guidelines as a school and is prohibited.]

APPENDIX D — SELECTED EXERPTS FROM THE PETITION FOR CERTIARI IN FREDERICK v. JUNEAU SCHOOL BOARD, ET AL. PP 17-21

School board policies across the country are largely in accord with Juneau's. While daunting to quantify with precision the number of school districts that prohibit advertisements or depictions of illegal substances, available statistics indicate that the Ninth Circuit's ruling would call into question the enforcement of standard policies adopted by the vast majority of public schools across the nation.

For example, in Arizona, which has its individual school policies available online, at least 90% of schools have anti-substance dress code policies (e.g., "Obscene language or symbols, or symbols of sex, drugs, or alcohol on clothing are expressly prohibited."). *See* Arizona School Board Association Manuals, http://lp.ctspublish.com/asba/public/lpext.dll?f=templates&fn=main-h.htm. [Of the 230 Arizona school district policies listed on this website, 207 have anti-substance dress code policies, 195 of which contain the State's standard language as quoted above and 12 of which have their own unique language. The other 23 schools do not have such policies, but, of these, 14 have school uniform policies that excuse the need for anti-substance dress code policies.] And the standard policy adopted by most Arizona schools further provides that such rules shall be in effect during school hours and at all school-related functions. *Id.*

Similarly, the California School Boards Association's model policies provide that "[c]lothing, jewelry and personal items (backpacks, fanny packs, gym bags, water bottles etc.) shall be free of writing, pictures or any other insignia . . . which bear drug, alcohol or tobacco company advertising,

promotions and likenesses" and further states that such rule "shall apply to all regular school activities." CSBA Sample Administrative Regulation § AR5132 (2001).

School officials in Arizona and California, which are bound by *Frederick*'s rigid analytical framework, would face a vexing dilemma. As a practical matter, the Ninth Circuit's ruling eviscerates the enforcement of such policies as written, unless school officials are confident that they can prove substantial and material disruption to school operations. Though *Frederick* stopped short of opining whether a t-shirt emblazoned with "BONG HITS 4 JESUS" could be constitutionally prohibited, the rationale of *Frederick* is equally applicable to clothing. Whether on a banner or on a t-shirt, whether in school or at an off-campus school activity, *Frederick* tells schools that they can no longer rely on the fact that illegal drugs undermine the educational mission of the schools. Rather, they must be prepared to defend their enforcement of such policies by producing substantial and material evidence of disruption in a court of law.

Meanwhile, outside the Ninth Circuit, school officials must consider whether they are willing to face the same fate as Principal Morse, in view of the underdeveloped (and now confused) state of the law. Again, the number of such officials who potentially could run afoul of the *Frederick* standard is extraordinarily high. In Texas, for example, Approximately 99% of public school districts have adopted the Texas Association of School Board's recommended policy language. That model policy prohibits clothing "advertising or depicting tobacco products, alcohol, or drugs" and applies during school and may be enforced during extracurricular

activities. [The Texas Association of School Boards Policy Service, which offers model local policies to school districts in Texas, also maintains the policy manuals (most of which are online or otherwise retrievable using search engines) for all 1,036 Texas school districts. *See* TASB Policy Service, http://www.tasb.org/services/policy/index.aspx; *see also* Tex. Educ. Agency, Texas Education Directory, *http://askted.tea.state.tx.us/org-bin/* school/SCHOOL_RPT?Y::All::DistDirectory. Approximately 1,025 of these districts have adopted TASB's recommended anti-substance dress code language (found at code "FNCA" in school policy manuals)] Published research examining such policies similarly shows that such regulations are widely prevalent. An empirical study on student handbooks in Illinois found that 83.75% of a sampling of schools prohibited messages promoting drugs or alcohol. Jane E. Workman & Beth Winfrey Freeburg, *Safety and Security in a SchoolEnvironment: The Role of Dress Code Policies*, J. Fam. & Consumer Sci., April 1, 2006, at 19. Another study based on questionnaires of a randomly-selected national sample of principals found that the prohibition of expression related to illegal substances was one of the "most frequently" occurring categories for student dress codes: "Statements, depictions, and/or advertisements for drugs, alcohol, and tobacco products were prominently banned." Todd A. DeMitchell et al., *Dress Codes in the Public Schools: Principals, Policies, and Precepts*, 29 J.L. & Educ. 31, 42-43 (2000). Additionally, numerous state school board associations promulgate guidelines and model policies, which are illustrative of the policies typically found in schools in those States. The New York State School Boards Association, for instance, recommends that schools adopt a policy that "[a] student's

dress, grooming and appearance, including hair style/color, jewelry, make-up, and nails, shall ... [n]ot promote and/or endorse the use of alcohol, tobacco or illegal drugs and/or encourage other illegal or violent activities." NYSSBA Sample Policy § 5300.25 (2006). And that policy is prefaced by an admonition that "this code applies to all students, school personnel, parents and other visitors when on school property or attending a school function." § 5300.05.

Likewise, the Wisconsin Association of School Boards provided the following example of an acceptable implemented policy for regulating student dress: "[S]tudents are prohibited from wearing clothing that ... promotes, depicts or advertises alcohol, drugs, tobacco products .... The policy applies during the school day, in school buildings and vehicles, and at all school-sponsored activities." Wis. Ass'n Sch. Bds., *Regulating Dress and Grooming*, The Focus, Dec. 2003, at 5.

Examples of such school policies can be found in every federal judicial circuit. These policies illustrate a heretofore settled understanding that schools enjoy authority to proscribe student expression promoting illegal substances without any heightened evidentiary requirement (of showing disruption to school operations). The Ninth Circuit has dramatically altered the legal landscape. The *Frederick* decision appears to be the first case in American jurisprudence that any court — federal or state — has denied public school officials the authority to proscribe pro-drug messages. At a minimum, the Ninth Circuit's opinion is the most far reaching limitation to date on the authority of school boards, principals, and teachers to regulate student expression advocating illegal substances.

APPENDIX E — PHOTOS OF T-SHIRT

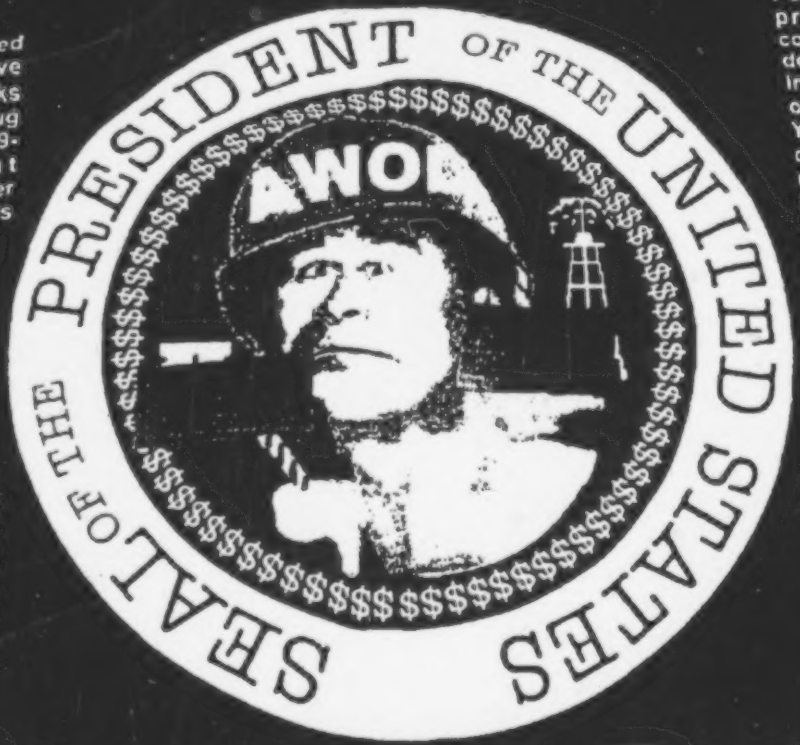
BEST AVAILABLE COPY

Addict

Bush claimed he could have passed checks for illegal drug use from 1989-1993. What about the other 50 years of his life?

AWOL, Draft Dodger

George W. Bush avoided Vietnam in the Texas Air National Guard. But that was not easy enough. Bush went AWOL in 1972.



Federal laws prohibit U.S. companies from doing business in Iraq, Iran, and other countries. Yet Halliburton did. They have numerous, insider, no-bid contracts with the US even now!

Lying Drunk Driver

Bush was arrested for drunk driving in Maine in 1976. He attempted to conceal it and the media ignored it.

George W. Bush

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No. 06-757

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SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

SETH MARINEAU, KATHLEEN MORRIS-KORTZ, DOUGLAS SHOIK, and RODNEY GRAHAM,

Petitioners,

v.

ZACHARY GUILES, by his father and next friend, Timothy Guiles; and by his mother and next friend Cynthia Lucas,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF THE QUESTION PRESENTED

Whether a public school student has a First Amendment right to wear a T-shirt criticizing President Bush for alleged alcohol and drug abuse, when the shirt neither contains plainly offensive language or images nor has disrupted the school's operations.

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INTRODUCTION

The school administrators who have petitioned this Court for certiorari in this case have gone to extraordinary lengths to justify punishing a student for wearing a political T-shirt that criticized President Bush for allegedly engaging in the very thing that they understandably oppose: the abuse of alcohol and drugs.

The school administrator petitioners' effort to censor Zachary Guiles' political views during the 2004 Presidential campaign is purportedly based on a dress code that prohibits all visual "displays" or "images" of alcohol and drugs. Cert. Pet. at 4, 48a. The school rule does not apply to verbal messages; nor does it take context into account. Hence a shirt emblazoned with the words "Take Heroin" in six-inch block letters passes literal muster under the school policy, while a T-shirt with the message "Just Say No To Alcohol," enhanced with an illustration of a beer can with the international "No" sign drawn through it, would trigger disciplinary action. Ct. App. A-340.

As the evidence at the trial and the Second Circuit opinion in this case make clear, the petitioners' claim that the mere viewing of illustrations of drugs or alcohol bottles on a T-shirt is per se harmful to students, even if an anti-drug message is communicated thereby, is without any basis in science or common sense.

The petitioners' gloom-and-doom suggestion that drug and alcohol programs in our public schools will be hamstrung unless the judgment below is reversed is wrong. We do not doubt, nor does the Second Circuit decision challenge, the constitutionality of school dress codes that prohibit the

wearing of items of clothing which glorify or promote the use of illegal substances. The Second Circuit's unanimous opinion by Judge Cardamone is explicitly limited to one student's T-shirt containing a political message *opposing* substance abuse.

The petitioners' claim that the Second Circuit opinion is in "direct conflict" with a decision of the Sixth Circuit is incorrect. The Marilyn Manson T-shirt at issue in the case relied upon by petitioners, *Boroff v. Van Wert City Board of Education*, 220 F.3d 465 (6th Cir. 2000), portrayed a rock musician known by students to be an advocate of illegal drug use, and the shirt had no political content.

The Second Circuit opinion is in harmony with prior decisions of this Court. The T-shirt's political message, like the black arm bands in *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969), did not disrupt the school's educational operations or interfere with the rights of others. Unlike the articles in the student newspaper in *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988), the student expression in this case was not school-sponsored. Nor did Zachary Guiles' T-shirt contain sexually explicit, vulgar, or plainly offensive language, which was the problem with the student's speech in *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986).

The petitioners' suggestion that this Court should permit the wholesale censorship of any student expression that school administrators consider "inappropriate" (the vague and utterly subjective legal standard proposed in the District Court's opinion) would effectively overrule *Tinker*, give authorities unfettered power to suppress unpopular views, and thereby render the First Amendment a virtual dead letter in our public schools.

COUNTER-STATEMENT OF THE CASE

A. Facts.

In the Spring of 2004, during the Presidential campaign, respondent Zachary Guiles was a 13 year-old seventh-grader at the Williamstown Middle High School, a Vermont public school that houses grades six through twelve in the same building. Ct. App. A-33. Zachary is an outstanding student. During his seventh grade year he took the SAT tests, achieving scores of 760 in math and 600 in English. Zachary was also the principal trombonist for the Vermont Youth Orchestra, with which he has performed in Carnegie Hall. Ct. App. A-85-86.

In March 2004 Zachary attended an anti-war rally on the Vermont statehouse lawn. There he donated $5.00 to the Vermont Green Party and received in return a T-shirt which criticizes President Bush's character and his Iraq war policy. In Zachary's words, he "wanted to have a T-shirt that expresses my political view." Ct. App. A-88-89.

The T-shirt describes President Bush as the "Chicken Hawk in Chief" who is engaged in a "World Domination Tour." The shirt accuses Mr. Bush of being an "AWOL draft-dodger," a "crook," a "lying drunk driver," and a "cocaine addict." Numerous illustrations enhance and dramatize the text, including a large caricature of a helmeted and chicken-bodied Mr. Bush, drawings of gushing oil wells, dollar signs, chickens, liquor bottles, a Minute Man drinking liquor, martini glasses, and cocaine lines, razor blades and straws. The Court of Appeals opinion describes the T-shirt in detail, and color photographs of it are reproduced in the Appendix to this Brief in Opposition.

Zachary wore the anti-Bush T-shirt to school approximately once a week for two months. According to the school principal, petitioner Kathleen Morris-Kortz, Zachary did so "without incident," and the shirt did not affect the academic mission of the school. Ct. App. A-364.

One pro-Bush classmate, Ashley Anderson, complained to some of their teachers about the shirt's politics, but they responded that the shirt was protected speech or that it did not violate school policy. Ct. App. A-97-100. One teacher was unsure whether the T-shirt "fit in" with the dress code and asked the principal for guidance. The principal told the teacher that she'd "look into it," but she took no action. Ct. App. 247-248.

During the second month that Zachary wore the anti-Bush T-shirt to school, his classmate Ashley Anderson noticed the illustrations of drugs on the shirt, and she informed Zachary that she might be able to get the shirt banned on that ground. Ct. App. A-95. On May 12, 2004, Zachary's class was scheduled to go on a school field trip together. Zachary was wearing the shirt, and Ashley and her mother (the school cheerleading coach and a chaperone for the class trip) walked up to him. Mrs. Anderson and Ashley stopped and stared at the shirt; then went directly into the office of the school official responsible for discipline, petitioner Seth Marineau, to report Zachary. Ct. App. S-151, Ct. App. A-103, A-152, A-185.

Mr. Marineau decided that the T-shirt violated that part of the school's dress code that prohibits students from "displaying alcohol, drugs, violence, obscenity, and racism." He presented Zachary with three choices: remove the shirt, wear it inside out, or place tape over the word "cocaine" and the drug and alcohol illustrations. Ct. App. A-106-108.

Zachary called his father, Tim Guiles, for advice. Ct. App. A-110. Mr. Guiles came to the school and spoke to Mr. Marineau. Then father and son went to see the Superintendent of Schools, petitioner Douglas Shiok, in an unsuccessful effort to persuade the administrators to allow Zachary to wear the shirt in school. Ct. App. A-111-114.

The next day, Zachary returned to school wearing his shirt uncensored. Zachary decided to do this because "it was concerning my free speech, and I think . . . free speech is a very important aspect of life." Ct. App. A-117. Mr. Marineau saw Zachary wearing the shirt and summoned him to his office. Zachary noticed that Mr. Marineau had a Holocaust Remembrance Day poster on his wall which included a Nazi swastika with a line or paperclip drawn through it as a symbol of opposition to anti-Semitism. Zachary pointed out to Mr. Marineau that the poster would violate the school's dress code if depicted on a student's clothing because the swastika is a symbol of racial hatred. Mr. Marineau responded by ripping the poster off the wall and throwing it into a trash can. Ct. App. A-119, 121-122, 164-166.

Mr. Marineau then gave Zachary the same three choices: remove the shirt, turn it inside out, or cover up the illustrations and the word "cocaine." Ct. App. A-119, 122. Zachary declined. Mr. Marineau filled out a disciplinary action form, Ct. App. A-33-34 and sent Zachary home for the remainder of the day. Ct. App. A-123. The form is a part of Zachary's disciplinary record at the school. Ct. App. A-16, 208.

Zachary returned to school the following morning with the drug and alcohol illustrations and the word "cocaine" covered with duct tape. Zachary wrote the word "censored" on each piece of tape. Mr. Marineau inspected the censored shirt and deemed it acceptable under the dress code. Ct. App. A-123-125.

The school has required the removal of student clothing such as Budweiser shirts and hats, which promote substance abuse. Ct. App. A-159. However, Zachary's anti-Bush T-shirt is the first item of clothing with political content that the school administration has ever banned or censored. Ct. App. A-161, 374-376. The school allows T-shirts with a pro-war, pro-administration slant, with slogans such as "Go Army," "U.S.A. No. 1," "Don't Mess With the U.S.A.," and "These Colors Don't Run." Ct. App. A-127.

There is an unwritten exception to the dress code ban that allows students to wear clothing that depicts drugs and alcohol while attending school-sponsored functions at which, in the words of School Superintendent Shiok, the school is able to exert "total control over the message." Ct. App. A-339-340.

B. Proceedings Below.

On May 27, 2004, Zachary Guiles filed a complaint under 42 U.S.C. § 1983, claiming that the school administrators had violated his First Amendment rights by suspending him from school and censoring the anti-Bush T-shirt. The complaint requested that the District Court issue an injunction barring school personnel from imposing further punishment on Zachary for wearing the T-shirt, and for an order expunging his disciplinary record. Ct. App. A-2, A-7-11.

During a three-day trial, the administrators conceded that they had violated Zachary's First Amendment rights by censoring the word "cocaine" on his T-shirt. Ct. App. A-194.

In an effort to justify the dress code's ban on all visual images or "displays" of drugs and alcohol on student clothing

no matter what the context, the defense relied upon the testimony of Carol Rosé, the Vermont official in charge of school drug and alcohol education programs. Ms. Rose endorsed an "environmental" approach to substance abuse prevention, meaning that students "are not hearing something in the classroom and then seeing a poster, an image, someone's clothing ... that depicts a counter message to what they received in the classroom." Ct. App. A-506-507. Ms. Rose theorized that a student looking at Zachary's T-shirt might conclude that substance abuse is no barrier to success in life. Ct. App. 520. Ms. Rose conceded, however, that she was unaware of any research linking the mere viewing of a political T-shirt such as Zachary's with drug or alcohol abuse by students. Nor was she aware of any scientific data to the effect that showing a student a bottle or a picture of a bottle would make that youngster more likely to abuse alcohol. Ct. App. A-525, 543-544.

William J. Reedy, Esq., the General Counsel of the Vermont Department of Education, the state agency that employs Ms. Rose, told the District Court that Ms. Rose's testimony "was not intended to draw any conclusions with respect to the outcome of the case or any substantive legal issue therein. To the extent that it did, it did not reflect an official position of the Commissioner or Department. . . ." Ct. App. A-35.

Charles Phillips, a former English teacher, athletic director, and principal at Montpelier High School who was named Vermont's "Principal of the Year" and inducted into the Vermont Principals Hall of Fame, testified that Montpelier High's dress code bans only student clothing that promotes alcohol and drug abuse. In Mr. Phillips' opinion, the sole function of the drug and alcohol illustrations on Zachary's

T-shirt was to make "a clear political statement" about President Bush's fitness for office, and that there was "no way" that a student could interpret them "to be a positive statement about the use of marijuana and alcohol." Mr. Phillips testified that a blanket ban on all drug symbols in school without regard to context is counter-productive because it "creates a climate where you can't talk about these things or not as apt to talk about them." Ct. App. A-433-434, 447-448, A-454-456.

Judge William K. Sessions, III of the District of Vermont held that the school administrators should not have censored the word "cocaine" on the T-shirt, and he ordered the expungement of Zachary's disciplinary record. However, Judge Sessions upheld the school's censorship of the illustrations of alcohol and drugs. He reasoned that under *Bethel Sch. Dist. No. 403 v. Fraser*, *supra*, school officials may censor any student speech that they deem "inappropriate." *Guiles v. Marineau*, 349 F. Supp. 871, 880-881 (D. Vt. 2004), Cert. Pet. App. 43a-44a.

Both sides appealed Judge Sessions' decision. The Court of Appeals for the Second Circuit affirmed the District Court's ruling against censorship of the word "cocaine" and its order expunging Zachary's disciplinary record. It vacated and remanded the lower Court's denial of injunctive relief against enforcement of the dress code with regard to Zachary's T-shirt. *Guiles v. Marineau*, 461 F.3d 320, 331 (2d Cir. 2006), Cert. Pet. App. 24a.

Judge Richard J. Cardamone, writing for a unanimous Court, determined that the District Court had read *Fraser* too broadly, and held that as a matter of law the illustrations on Zachary's shirt do not rise to the level of "plainly offensive" speech that *Fraser* permits schools to censor. *Id.* at 327, Cert. Pet. App. 16a.

Judge Cardamone wrote that

> while the exact contours of what is plainly offensive are not so clear to us as the star Arcturus is on a cloudless night, they are evident enough for us to hold that the images of drugs and alcohol on [Zachary's] T-shirt are not offensive, let alone plainly so, under *Fraser*. We believe this is especially so given that the messages are presented as part of an anti-drug T-shirt, and, moreover, a T-shirt with a political message.

461 F.3d at 330, Cert. Pet. App. at 22a.

The Court of Appeals held the political message of Zachary's T-shirt to be protected speech under the general rule of *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, *supra*, which allows students to express their political views absent evidence of school disruption. Judge Cardamone noted that "the parties agree that [Zachary's] T-shirt did not cause any disruption or confrontation in the school. Nor do defendants contend that they had a reasonable belief that it would." 461 F.3d at 330-331, Cert. Pet. App. at 22a-23a.

The Court of Appeals stressed that it was expressing no opinion as to whether "images of illegal drugs and alcohol on a T-shirt that promote drug and alcohol use could be censored under the Supreme Court's student speech cases." Judge Cardamone concluded, "We address only the images on [Zachary's] T-shirt and do not prejudge any question to be presented in a subsequent case." 461 F.3d at 331, Cert. Pet. App. at 23a-24a.

REASONS FOR DENYING THE PETITION

1. The Second Circuit decision is in harmony with the decisions of other federal circuits.

Contrary to petitioners' claim, this case is not "in direct conflict" with the decision of any other federal circuit. It is supported by other federal court decisions on student speech involving illustrations on T-shirts.

In *Newsom v. Albermarle County Sch. Bd.*, 354 F.3d 249, 252 (4th Cir. 2003), a middle-school principal had banned a student's pro-National Rifle Association T-shirt that "depicted three black silhouettes of men holding firearms" which they "appear[ed] to be aiming." The illustration of the "sharpshooters" on the shirt had raised in the principal's mind a troubling echo of "the shootings at Columbine High School in Colorado and other incidents of school-related violence." For that reason, she deemed it inappropriate in her "middle-school environment" and required the student to turn it inside-out.

The Fourth Circuit invalidated the ban on the T-shirt citing as authority *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, *supra*, because there was no evidence that the NRA T-shirt "ever substantially disrupted school operations or interfered with the rights of others." 354 F.3d at 259.

In *Castorina v. Madison County Sch. Bd.*, 246 F.3d 536 (6th Cir. 2001), the Sixth Circuit reversed a grant of summary judgment upholding a ban on T-shirts decorated with Confederate flags and pictures of the country music singer Hank Williams, Jr. The students testified that the T-shirts were intended to "express their southern heritage." *Id.* at 538.

The Court of Appeals acknowledged the existence of cases that have allowed bans on Confederate flag T-shirts where the shirts actually sparked fights in school. 246 F.3d at 543. In contrast, the display of the Confederate flag in the Hank Williams context "may not have had any significant disruptive effect." *Id.* at 543.

See also Barber v. Dearborn Public Schools, 286 F. Supp. 2d 847 (E.D. Mich. 2003), where the District Court issued an injunction against a ban on a student T-shirt which displayed a photo of President Bush with the caption "International Terrorist." The Court concluded that the school had not met its burden under *Tinker* of proving that disruption would result, even though many of the students and their parents were Iraqi refugees who had been oppressed under the Saddam Hussein regime.

The Sixth Circuit decision relied upon by the petitioners to establish a "direct conflict" between circuits, *Boroff v. Van Wert City Bd. of Educ.*, 220 F.3d 465, 470 (6th Cir. 2000), is distinguishable on it facts. *Boroff* involved a T-shirt that depicted the "Goth" rock star Marilyn Manson and a three-headed Jesus. The Court upheld censorship of the T-shirt, in part because Marilyn Manson was widely known to be "a drug user" who "promotes drug abuse." Moreover, the T-shirt was devoid of "any particular . . . political viewpoint." *Boroff* does not present a circuit conflict because Zachary's T-shirt case was political and contained an explicitly anti-drug message.

For the same reasons, the Second Circuit decision is readily distinguishable from *Fredrick v. Morse*, 439 F.3d 1114 (9th Cir. 2006), *cert. granted sub nom. Morse v. Frederick*, Docket No. 06-278. The "Bong Hits for Jesus" banner in

that case is on its face apolitical, and to the extent that it conveys any comprehensible message, it reasonably could be interpreted as favoring illegal drug use.

2. The Second Circuit decision is in harmony with prior decisions of this Court.

The Second Circuit decision painstakingly analyzed this Court's prior cases on student speech and properly applied them to the issue of whether Zachary's T-shirt is entitled to First Amendment protection. The Second Circuit correctly determined that *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, *supra*, governs the outcome.

In *Tinker*, public school students decided to wear black armbands to school to express opposition to the Vietnam War and their support for a truce. This Court held that the school dress code, which prohibited the wearing of all armbands, violated the students' First Amendment right to freedom of speech. The Court stressed that, in context, the wearing of the armbands was "closely akin to 'pure speech' which, we have repeatedly held, is entitled to comprehensive protection under the First Amendment." 393 U.S. at 506. Justice Fortas, writing for this Court, held that students are entitled to express their political views unless school authorities prove that the exercise of free speech creates a "material and substantial interference with schoolwork or discipline." *Id.* at 511.

School authorities in *Tinker* adopted the dress code after parents complained about the anti-war views of the students. This case is strikingly similar in that regard. Zachary wore his T-shirt in school for two months without incident until a pro-Bush student made clear that she would try to use the

dress code as a pretext to force him to stop wearing the shirt, and her mother, the school cheerleading coach, complained to petitioner Marineau. In both cases, the political content of the speech, rather than any actual disruption or reasonable fear of same, triggered official action to censor it.

Other aspects of this case strongly suggest that the Williamstown school's censorship of Zachary's T-shirt was motivated in significant part by the shirt's political content. The school principal, petitioner Morris-Kortz, knew that Zachary was wearing the shirt, but she took no action against him until the pro-Bush parent complained. Ct. App. A-247-248. School officials conceded at trial that Zachary's shirt was the first item of student clothing with a political viewpoint that they had ever banned or censored. Ct. App. A-161, 375-376. It was also undisputed below that the school permits students to wear T-shirts that support the Iraq war and pro-Bush administration views. Ct. App. A-127. The school has developed an unwritten exception to the dress code that allows student clothing depicting drugs and alcohol in circumstances where it can exert "total control over the message." Ct. App. A-339-340.

The two student speech cases issued by this Court post-*Tinker* provide no convincing legal justification for the censorship of Zachary's T-shirt.

Hazelwood Sch. Dist. v. Kuhlmeier, *supra*, involving articles in a student newspaper, permits censorship of student expression if it is "reasonably related to legitimate pedagogical concerns," but only when such expression is "school-sponsored," 484 U.S. at 273, which Zachary's T-shirt was not.

Bethel Sch. Dist. v. Fraser, *supra* upheld disciplinary action against a student who delivered a speech to his high school assembly supporting a candidate for student council because of his alleged sexual prowess. Chief Justice Burger, writing for the Court, reasoned that discipline did not violate the First Amendment because "The pervasive sexual innuendo in Fraser's speech was plainly offensive to both teachers and students – indeed to any mature person." 478 U.S. at 683.

Relying on *Fraser*, the District Court in this case gave its imprimatur to the censorship of Zachary's T-shirt because school authorities had deemed its illustrations offensive in the watered-down sense of being "inappropriate." According to Judge Sessions, *Fraser* should be read to permit the censorship of merely "inappropriate" speech "even if that speech has political content." *Guiles v. Marineau*, *supra*, 349 F.Supp.2d at 879, Cert. Pet. App. 41a. Petitioners have adopted that argument here.

The Second Circuit correctly observed that the "flaw in this position is that it conflates the rule of *Hazelwood* with *Fraser*, and in doing so, eviscerates *Tinker*." *Guiles v. Marineau*, *supra*, 461 F.3d at 330, Cert. Pet. App. 21a. Stretching the phrase "plainly offensive" to encompass any student expression that school authorities deem "inappropriate" would effectively overrule *Tinker's* easily understood, objective standard, and substitute a vague subjectivity that knows no limits.

This Court in *Hazelwood*, its most recent decision on student speech, expressly reaffirmed the vitality of *Tinker* and its general rule that students "cannot be punished merely for expressing personal views on school premises . . . unless school authorities have reason to believe that such expression will 'substantially interfere with the work of the school or impinge upon the rights of other students.'" *Hazelwood*, *supra*, 484 U.S. at 266, quoting *Tinker*, *supra*, 393 U.S. at 509.

This is a relatively simple and straightforward First Amendment case. The general rule of *Tinker* applies to the text and illustrations on Zachary's T-shirt and protects its political, anti-drug message from censorship by school officials. The Second Circuit was right to so hold.

CONCLUSION

This Court should deny the petition for writ of certiorari.

Respectfully submitted,

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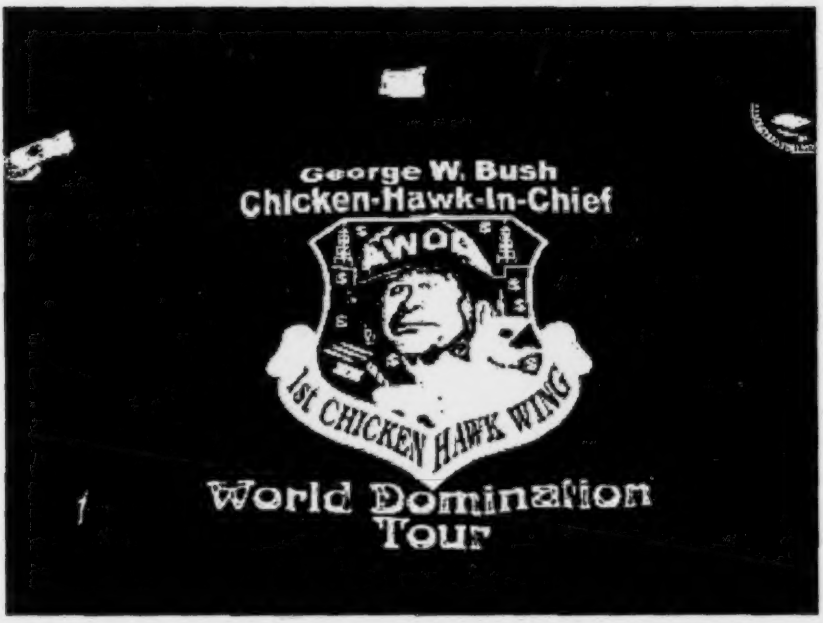
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